

GEORGE A. KIMBRELL (*Pro Hac Vice*)  
 PETER T. JENKINS (*Pro Hac Vice*)  
 PAIGE M. TOMASELLI (State Bar No. 237737)  
 SYLVIA SHIH-YAU WU (State Bar No. 273549)  
 Center for Food Safety  
 303 Sacramento Street, 2nd Floor  
 San Francisco, CA 94111  
 T: (415) 826-2770 / F: (415) 826-0507  
 Emails: gkimbrell@centerforfoodsafety.org  
 pjenkins@centerforfoodsafety.org  
 ptomaselli@centerforfoodsafety.org  
 swu@centerforfoodsafety.org

*Counsel for Plaintiffs*

**THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION**

STEVE ELLIS, TOM THEOBALD, JIM  
 DOAN, BILL RHODES, CENTER FOR  
 FOOD SAFETY, BEYOND PESTICIDES,  
 SIERRA CLUB, and CENTER FOR  
 ENVIRONMENTAL HEALTH,

*Plaintiffs,*

v.

STEVEN P. BRADBURY, DIRECTOR OF  
 OFFICE OF PESTICIDE PROGRAMS,  
 UNITED STATES ENVIRONMENTAL  
 PROTECTION AGENCY; and BOB  
 PERCIASEPE, ACTING  
 ADMINISTRATOR AND DEPUTY  
 ADMINISTRATOR, UNITED STATES  
 ENVIRONMENTAL PROTECTION  
 AGENCY,

*Defendants.*

Case No. 3:13-cv-01266-LB

**FIRST AMENDED COMPLAINT FOR  
 DECLARATORY AND INJUNCTIVE  
 RELIEF**

Administrative Procedure Act Case

## **INTRODUCTION**

1  
2           1.       This is a civil action for injunctive and declaratory relief. The original Complaint  
3 was dated Mar. 21, 2013. ECF No. 1. This First Amended Complaint is filed pursuant to a  
4 stipulation with the Defendants and approval by the Court dated May 17, 2013. ECF No. 17.  
5 Plaintiffs Steve Ellis, Tom Theobald, Jim Doan, Bill Rhodes, Center for Food Safety (CFS),  
6 Beyond Pesticides, Sierra Club, and Center for Environmental Health (CEH) (collectively  
7 Plaintiffs) challenge the actions of Defendants Steven P. Bradbury, Director of Office of  
8 Pesticide Programs of the United States Environmental Protection Agency (EPA), and Bob  
9 Perciasepe, Acting Administrator and Deputy Administrator of EPA (collectively EPA or  
10 Defendants) to allow the ongoing use of pesticide products containing the active ingredients  
11 clothianidin and thiamethoxam, in violation of the Federal Insecticide, Fungicide and  
12 Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*; § 7(a)(2) of the Endangered Species Act  
13 (ESA), 16 U.S.C. § 1536(a)(2); and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et*  
14 *seq.*

15           2.       Clothianidin and its parent compound, thiamethoxam, are two widely-used  
16 pesticides in a class of pesticides known as neonicotinoids, which have been shown to adversely  
17 impact the survival, growth, and health of honey bees and other pollinators vital to U.S.  
18 agriculture, and which have harmful effects on other animals, including threatened and  
19 endangered species. In a vast and extremely risky experiment, EPA has allowed over two  
20 million pounds of clothianidin and thiamethoxam to be used annually on more than 100 million  
21 acres and on dozens of different plant crops without adhering to existing procedural frameworks  
22 and with no adequate risk assessments in place.

23           3.       In most instances, EPA has approved clothianidin and thiamethoxam product  
24 registrations, new uses, and use amendments without affording notice in the Federal Register and  
25 the opportunity for public comment, in violation of the FIFRA and the APA. Substantively, EPA  
26 has failed to modify its regulation of these pesticides in response to the many scientifically-sound  
27 studies and adverse effect reports illustrating the risks these neonicotinoid pesticides pose.  
28 EPA's regulatory approvals have been a major factor in excessive honey bee mortality and the

1 decline of pollinator populations in the same time period. EPA's regulatory actions, resulting in  
2 the continued use of clothianidin and thiamethoxam, have also continued to place threatened and  
3 endangered species in jeopardy.

4         4. In addition to suffering chronic effects leading to excess mortality, which includes  
5 a phenomenon called Colony Collapse Disorder, hundreds of the nation's beekeepers and honey  
6 producers suffer from acute effects each spring, when neonicotinoid-treated corn, in particular, is  
7 planted in virtually every state. Tens of thousands of their bee colonies have been exposed to  
8 lethal levels of neonicotinoid-contaminated dust during corn planting season. Plaintiff  
9 beekeepers and honey producers have suffered, and will continue to suffer, devastating economic  
10 hardships unless Defendants take action, which they have refused to do despite repeated formal  
11 requests.

12         5. EPA is well aware of recent studies and reports illustrating the risks to honey  
13 bees, pollinators, and other sensitive species. In December 2010, Plaintiff Beyond Pesticides,  
14 along with other environmental groups, beekeepers, and honey producers, submitted a formal  
15 letter requesting that EPA issue a stop sale order of clothianidin products.<sup>1</sup> EPA denied the  
16 request in February 2011.<sup>2</sup> In March 2012, Plaintiffs CFS and Beyond Pesticides, along with  
17 numerous other environmental groups, beekeepers, and honey producers, filed a legal petition  
18 (hereafter the Clothianidin Legal Petition or the Petition) asking EPA to initiate immediate  
19 suspension and cancellation of clothianidin products.<sup>3</sup> EPA denied the suspension request in  
20 July 2012.<sup>4</sup> Plaintiff CFS further submitted a comment letter regarding similar risks of  
21

---

22 <sup>1</sup> Letter from Beyond Pesticides *et al.*, to EPA (Dec. 8, 2010), *available at*  
<http://www.epa.gov/opp00001/about/intheworks/clothianidin-petition2.pdf>.

23 <sup>2</sup> Letter from Steven Bradbury, Director, Office of Pesticide Programs, EPA, to Steve Ellis *et al.*  
24 (Feb. 18, 2011), *available at* [http://www.epa.gov/opp00001/about/intheworks/clothianidin-](http://www.epa.gov/opp00001/about/intheworks/clothianidin-response-letter.pdf)  
[response-letter.pdf](http://www.epa.gov/opp00001/about/intheworks/clothianidin-response-letter.pdf).

25 <sup>3</sup> CFS *et al.*, Clothianidin Legal Petition (Mar. 21, 2012), *available at*  
26 [http://www.centerforfoodsafety.org/wp-content/uploads/2012/10/CFS-Clothianidin-Petition-3-](http://www.centerforfoodsafety.org/wp-content/uploads/2012/10/CFS-Clothianidin-Petition-3-20-12.pdf)  
[20-12.pdf](http://www.centerforfoodsafety.org/wp-content/uploads/2012/10/CFS-Clothianidin-Petition-3-20-12.pdf).

27 <sup>4</sup> Letter from Steven Bradbury, Director, Office of Pesticide Programs, EPA, to Peter T. Jenkins  
28 (July 17, 2012), *available at* [http://www.epa.gov/opp00001/about/intheworks/epa-respns-to-](http://www.epa.gov/opp00001/about/intheworks/epa-respns-to-clothianidin-petition-17july12.pdf)  
[clothianidin-petition-17july12.pdf](http://www.epa.gov/opp00001/about/intheworks/epa-respns-to-clothianidin-petition-17july12.pdf).

1 thiamethoxam products and requesting suspension of the pesticide in October 2012.<sup>5</sup> EPA also  
 2 refused that suspension request.<sup>6</sup>

3 6. In addition to the Plaintiffs, hundreds of thousands of Americans endorsed an  
 4 informal citizen petition between 2011 and 2012, urging Defendants to suspend clothianidin's  
 5 registration. There is intense public interest in EPA's actions, due to the loss of honey bees and  
 6 other beneficial insects; the resulting economic, food supply, and ecosystem damages; and the  
 7 unnecessary persistent toxic pollution of America's private and public landscapes.

8 7. In allowing this scenario to unfold over the last thirteen years, EPA has violated  
 9 the FIFRA, the ESA, and the APA. EPA has denied Plaintiffs and the public mandatory notice  
 10 and public comment opportunities, severely damaged the interests of Plaintiffs, injured vital  
 11 pollinators and threatened and endangered species, and caused unreasonable adverse  
 12 environmental and economic impacts.

### 13 **JURISDICTION AND VENUE**

14 8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28  
 15 U.S.C. § 1346 (United States as defendant), 28 U.S.C. §§ 2201-02 (declaratory relief), 5 U.S.C.  
 16 § 702 (APA), 7 U.S.C. § 136n(a) (FIFRA), and 16 U.S.C. § 1540(e), (g) (ESA).

17 9. Jurisdiction is in the District Court under the ESA citizen suit provision, which  
 18 allows "any person" to sue an agency "alleged to be in violation of any provision of [the ESA]"  
 19 and provides that the "district courts shall have jurisdiction . . . to enforce any such provision or  
 20 regulation . . . ." 16 U.S.C. § 1540(g)(1). Pursuant to the ESA, 16 U.S.C. § 1540(g)(2)(A),  
 21 Plaintiffs CFS, Beyond Pesticides, Sierra Club, Steve Ellis, and Tom Theobald have provided  
 22 Defendants with at least sixty days written notice of the their violations under the ESA and of  
 23 Plaintiffs' intent to sue should Defendants fail to remedy such violations (hereafter the Sixty-Day  
 24 Notice Letter).<sup>7</sup> To date, Defendants have not remedied any of the violations of law set forth in  
 25

26 <sup>5</sup> Letter from Plaintiffs to EPA (Oct. 16, 2012) (on file with Plaintiffs).

27 <sup>6</sup> Letter from EPA to Plaintiffs (Feb. 27, 2013) (on file with Plaintiffs).

28 <sup>7</sup> Sixty-Day Notice Letter from Plaintiffs Center for Food Safety *et al.* to Defendants and Ken Salazar, former Secretary of the Interior (Sept. 5, 2012) (on file with Plaintiffs).

1 Plaintiffs' Sixty-Day Notice Letter.

2 10. Jurisdiction also lies in this Court under the FIFRA's judicial review provision, 7  
3 U.S.C. § 136n(a), which provides:

4 District court review.

5 Except as otherwise provided in this Act, the refusal of the Administrator to  
6 cancel or suspend a registration or to change a classification not following a  
7 hearing and other final actions of the Administrator not committed to the  
8 discretion of the Administrator by law are judicially reviewable by the district  
9 courts of the United States.

10 11. Each of the fourteen claims in this Complaint involve the refusal of the  
11 Defendants to cancel or suspend a registration or to change a classification not following a  
12 hearing, failure to conduct required ESA analysis and consultation, and other final actions of the  
13 Administrator not committed to his or her discretion; thus, jurisdiction lies properly in the  
14 District Court. 7 U.S.C. § 136n(a); 16 U.S.C. § 1540(g)(1). In particular, Defendants have: a)  
15 refused to cancel or suspend the conditionally registered uses of clothianidin and thiamethoxam  
16 despite clear evidence that the registrants for those uses have failed to comply with the  
17 conditions imposed by EPA; b) changed the classifications of numerous conditional registrations  
18 of thiamethoxam and clothianidin to unconditional registrations, as well as approved  
19 thiamethoxam and clothianidin products as unconditional registrations, despite the registrants'  
20 failures to comply with the conditions EPA imposed on them; c) taken final action, without a  
21 hearing, on Plaintiffs' Clothianidin Legal Petition in denying the request to declare an "imminent  
22 hazard" exists; d) failed to comply with the ESA, in approving all of the registered uses of these  
23 compounds, in converting registrations to the unconditional classification and in denying an  
24 "imminent hazard" exists; e) violated the FIFRA requirement to provide notices of clothianidin  
25 and thiamethoxam registrations and changed use applications in the Federal Register and allow  
26 public comment, as well as other notice requirements; f) approved inadequate labels under  
27 FIFRA and the ESA for clothianidin and thiamethoxam products; and g) taken other actions as  
28 alleged herein that caused unreasonable adverse environmental and economic impacts that are  
reviewable in the District Court.

12. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201 (declaratory judgment).

13. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(e)(1)(c) because one or more Plaintiffs reside in this district, and pursuant to 28 U.S.C. § 1391(e)(1)(b), because a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, in this district.

### **INTRADISTRICT ASSIGNMENT**

14. Pursuant to Local Rule 3-2(c) and (d), assignment of this action is appropriate in the San Francisco or Oakland Divisions because one or more Plaintiffs reside in San Francisco.

### **PARTIES**

#### ***Beekeeper and Honey Producer Plaintiffs***

15. The interests of Plaintiffs Steve Ellis, Tom Theobald, Jim Doan, and Bill Rhodes (collectively Beekeeper and Honey Producer Plaintiffs) are being, and will be, adversely affected by EPA's actions and inactions complained of herein. Beekeeper and Honey Producer Plaintiffs have suffered confirmed or unconfirmed clothianidin- and thiamethoxam-related kills to their honey bees, both acute and chronic, as well as poor colony health and failure to thrive. Beekeeper and Honey Producer Plaintiffs are geographically and operationally representative of this essential agricultural sector, in which there are thousands of similarly-affected businesses and individuals.

16. Plaintiff Mr. Steve Ellis owns and operates Old Mill Honey Company, a migratory beekeeping operation with 2,300 hives of bees during the summer honey-producing season, and with several employees. The hives he manages for his business produce honey for market over the summer months in Minnesota, and paid pollination services in the winter and spring in California. Mr. Ellis has over thirty-five years of experience and has served as an officer in beekeeper organizations for many years. He is the Secretary of the National Honey Bee Advisory Board. His common beekeeping practices over the last decade include allowing his bee colonies to forage, and often to do pollination, in the following types of crops and habitats: almonds, corn, soybeans, sunflowers, edible beans, ornamental trees, forest trees,

1 peaches, plums, residential and landscaped areas, golf courses, and lawns. Over the course of the  
2 last six to seven years, he has observed a new type of bee kill caused by pesticide poisoning in  
3 the early spring, especially, but not only, at corn seeding time, and early dandelion bloom. He  
4 has suffered major bee kills that were attributable to thiamethoxam and/or clothianidin. His fall  
5 and winter mortality have remained between 30–60% over this period. This level of losses is  
6 unsustainable. Mr. Ellis keeps bees in west central Minnesota where corn and soybeans are  
7 increasingly the dominant crops. It is not practically feasible to locate his bees away from these  
8 crops during the summer growing season.

9 17. Plaintiff Mr. Tom Theobald is a commercial beekeeper and owner of the Niwot  
10 Honey Farm in Niwot, Colorado. He has conducted his beekeeping business for thirty-eight  
11 years. He was the President of the Boulder County Beekeepers Association for thirty years. Mr.  
12 Theobald served two terms as Vice-President of the Colorado Beekeepers' Association and was  
13 the last County Bee Inspector in Colorado. He is losing 40–60% of his colonies each year and in  
14 2011 and again in 2012 had his smallest honey crops in thirty-seven years. His common  
15 beekeeping practices over the last decade include allowing his bee colonies to forage in the  
16 following types of crops and habitats: corn, sunflowers, apples and other fruit trees, ornamental  
17 trees, residential gardens, and various turf and/or lawn applications. He has observed, based on  
18 his long personal and government experience with the impacts of various pesticides on bees as  
19 well as through his own research, that a primary cause of his recent and continuing losses is the  
20 uncontrolled use of neonicotinoid pesticides (including clothianidin and thiamethoxam) over vast  
21 acres of agricultural land near his business, as well as on untold acres of nearby urban and  
22 suburban land in Boulder County.

23 18. Plaintiff Mr. Jim Doan has run Doan Family Farms based in Hamlin, New York,  
24 with his wife, son and several hired men. He has kept honey bees for forty-five years. In 2006  
25 Mr. Doan ran as many as 5,300 hives in New York and Florida; his bees pollinate a vast portion  
26 of New York's apple crop each year. His common beekeeping practices over the last decade  
27 include allowing his bee colonies to forage, and often to do pollination, in the following types of  
28 crops and habitats: corn, soybeans, cucumbers, pumpkins, squash, melon, citrus, ornamental



1 trees, apples, other fruit trees, residential and landscaped areas, wheat, cabbage, berries, peas,  
2 and green beans. Since 2006, he has been unable to keep from losing more than 50% of his  
3 hives each year to symptoms that, based on his experience, are caused by both acute and chronic  
4 exposure to the new neonicotinoid pesticides. In the spring and summer of 2012, Mr. Doan  
5 suffered a devastating bee kill caused by clothianidin, which very clearly came from  
6 contaminated dust and other exposure routes related to the several cornfields around his bee  
7 colonies. He feared that if he continued to suffer such losses to his business, without monetary  
8 support, it would be doomed to disappear. His bees could not be replaced as fast as they were  
9 dying.

10 19. In late May 2013, in response to another massive bee kill, Mr. Doan was  
11 compelled to sell Doan Family Farms and he has had to reduce his many-decades old beekeeping  
12 business. While he remains a beekeeper, the financial and personal strains of repeated massive  
13 neonicotinoid bee kills in addition to the other pressures of the business may be too much for  
14 him to continue.

15 20. Plaintiff Mr. Bill Rhodes owns Bill Rhodes Honey Company, the largest  
16 commercial honey producer in Florida, based in Umatilla. A beekeeper for forty-one years, his  
17 company employs about fifteen people. His common beekeeping practices over the last decade  
18 include allowing his colonies to forage in the following types of crops and habitats: corn,  
19 soybeans, sunflowers, and residential areas with lawns, gardens, and other landscaping. Mr.  
20 Rhodes produces several premium honey varieties, both in Florida and South Dakota, and his  
21 company also ships bees to Georgia and other states. He seeks to maintain about 9,000 hives,  
22 but the impacts of pesticides, including thiamethoxam and clothianidin, make keeping that level  
23 very difficult. Mr. Rhodes started seeing symptoms of Colony Collapse Disorder around 2004  
24 and 2005, and again in 2007 and 2008. In the latter year he lost 7,200 of 9,000 hives. Major  
25 losses have continued, far exceeding normal loss rates during the three earlier decades of his  
26 operations. Mr. Rhodes has seen other beekeepers driven out of the business from major losses,  
27 and has a high level of concern that his own livelihood based on premium honey production is  
28 threatened.



1           21.     The use of systemic pesticides such as thiamethoxam and clothianidin is not  
2 posted with signs nor is any other notice provided to beekeepers about their use as a matter of  
3 common practice. Based on the Beekeeper and Honey Producer Plaintiffs' years of experience  
4 and their knowledge of the use of neonicotinoids on a broad range of U.S. crops and habitats, the  
5 Beekeeper and Honey Producer Plaintiffs are reasonably certain that their bees were frequently  
6 exposed to these systemic insecticides in many of the crops and habitats their bees visited, as  
7 well as within their own hives via dust, pollen, and other exposure routes. The Beekeeper and  
8 Honey Producer Plaintiffs are also concerned that in the future their bees will be exposed to, and  
9 further weakened or killed by, thiamethoxam and clothianidin used in the crops and habitats their  
10 bees visit, other crops and habitats, as well as cumulative soil residues of thiamethoxam and  
11 clothianidin in those habitats.

12           22.     Each of the Beekeeper and Honey Producer Plaintiffs is injured by EPA's actions  
13 and inactions complained of herein. EPA's failure to provide Beekeeper and Honey Producer  
14 Plaintiffs with the FIFRA-mandated notices of application for clothianidin and thiamethoxam  
15 registration and changed uses in the Federal Register, and its failure to provide mandatory public  
16 comment periods, denied Plaintiffs the ability to submit information to the EPA that may have  
17 convinced the agency not to issue those registrations or use amendments. For Beekeeper and  
18 Honey Producer Plaintiffs, the monetary damages to their businesses are significant, including  
19 the costs of replacing killed and weakened bees; contaminated beeswax, comb, and hives;  
20 reduced honey production and lost profits; increased labor, equipment, and supply expenditures;  
21 and costs and lost profits from the inability to perform contracted pollination services. Their  
22 losses are not insured or insurable. On a personal level, they have suffered from increased  
23 workload to address bee kills and poor bee health, and personal stress and anxiety from seeing  
24 the valuable animals in their care die, as well as being compelled to pursue enforcement actions  
25 with government agencies about their farmer neighbors, and other damages. The relief sought in  
26 this case will provide redress for their ongoing harms and aid in preventing additional future  
27 damages from clothianidin and thiamethoxam, which are expected to worsen in the future absent  
28 change.

1 ***Public Interest Group Plaintiffs***

2       23.     The interests of CFS, Beyond Pesticides, Sierra Club, and CEH (collectively  
3 Public Interest Group Plaintiffs) and their members are being, and will be, adversely affected by  
4 EPA's actions and inactions complained of herein. EPA's continued registrations of clothianidin  
5 and thiamethoxam products and failure to take regulatory actions to suspend or cancel such  
6 product registrations harm the interests of Public Interest Group Plaintiffs and Public Interest  
7 Group Plaintiffs' members. EPA's actions and inactions have, and will continue to have, an  
8 adverse effect on Public Interest Group Plaintiffs' missions and their members' conservation,  
9 environmental, recreational, aesthetic, and economic interests.

10       24.     Plaintiff CFS brings this action on behalf of itself and its members. CFS and its  
11 members are being, and will be, adversely affected by EPA's actions and inactions complained  
12 of herein. CFS is a Washington, D.C.-based, public interest, nonprofit membership organization  
13 that has offices in San Francisco, CA; Portland, OR; and Washington, D.C.

14       25.     Since CFS's founding in 1997, it has sought to ameliorate the adverse impacts of  
15 industrial farming and food production systems on human health, animal welfare, and the  
16 environment. CFS has over 280,000 members nationwide. CFS seeks to protect human health  
17 and the environment by advocating for thorough, science-based safety testing of new agricultural  
18 products prior to any marketing and cultivation of crops in a manner that minimizes negative  
19 impacts such as increased use of pesticides and evolution of resistant pests and weeds. A  
20 foundational part of CFS's mission is to further the public's fundamental right to know what is in  
21 their food and food production methods.

22       26.     Plaintiff Beyond Pesticides brings this action on behalf of itself and its members.  
23 Beyond Pesticides and its members are being, and will be, adversely affected by EPA's actions  
24 and inactions complained of herein. Based in Washington, D.C., Beyond Pesticides is a national  
25 nonprofit corporation that promotes safe air, water, land, and food, and works to protect public  
26 health and the environment by encouraging a transition away from the use of toxic pesticides.

1           27. With Beyond Pesticides's resources made available to the public on a national  
2 scale, Beyond Pesticides contributes to a significant reduction in unnecessary pesticide use, thus  
3 improving protection of public health and the environment.

4           28. Plaintiff Sierra Club brings this action on behalf of itself and its members. Sierra  
5 Club and its members are being, and will be, adversely affected by EPA's actions and inactions  
6 complained of herein. The Sierra Club is a national nonprofit organization of approximately  
7 600,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to  
8 practicing and promoting the responsible use of the earth's ecosystems and resources; to  
9 educating and enlisting humanity to protect and restore the quality of the natural and human  
10 environment; and to using all lawful means to carry out these objectives. The Sierra Club is a  
11 California nonprofit corporation headquartered in San Francisco, CA.

12           29. The Sierra Club's concerns encompass endangered species, habitat protection,  
13 pollution, and industrial agriculture, all of which are involved in this case. The loss of bees and  
14 other beneficial insects, and the threats to native ecosystems and wildlife posed by neonicotinoid  
15 insecticides, harm the interests of the Sierra Club and its members.

16           30. Plaintiff CEH is a tax-exempt, nonprofit corporation with offices in Oakland,  
17 California; and New York, New York. Founded in 1996, CEH is a nonprofit organization  
18 dedicated to protecting the public from environmental and public health hazards, including  
19 harmful pesticides. CEH achieves its mission by working with communities, consumers,  
20 workers, government, and the private sector to demand and support business and agricultural  
21 practices that are safe for public health and the environment.

22           31. As part of its mission, CEH and its staff have long been involved in efforts to  
23 combat the negative human health and environmental effects of pesticides and other harmful  
24 contaminants in our food system. For example, CEH is a member of Californians for Pesticide  
25 Reform, an organization whose mission is to protect public health, improve environmental  
26 quality, and expand a sustainable and just agriculture system by seeking to change state and local  
27 pesticide policies and practices. CEH's Research Director, Caroline Cox, serves on the  
28 California Department of Pesticide Regulation's Pest Management Advisory Committee and is a

1 member of the Board of Beyond Pesticides. When necessary, CEH also engages in public  
2 interest litigation to address the food safety concerns raised by the current regulatory framework  
3 and the negative impacts of unsafe products. The interests of CEH and its members in reducing  
4 the harmful impacts stemming from pesticide use are being, and will be, adversely affected by  
5 EPA's ongoing registrations of clothianidin and thiamethoxam products.

6 32. Public Interest Group Plaintiffs and their members have a vital interest in the  
7 survival and health of honey bees and other plant pollinators to ensure a nutritious and safe food  
8 supply and healthy natural ecosystems and gardens. Each of the Public Interest Group Plaintiffs  
9 has a strong interest in the conservation of the vast numbers of native ESA-listed species that are  
10 potentially impacted, directly and indirectly, by clothianidin and thiamethoxam. Several of the  
11 Public Interest Group Plaintiffs and their members have personally visited the ranges of directly  
12 impacted ESA-listed invertebrates, including, but not limited to, listed plant pollinators, as well  
13 as other indirectly impacted ESA-listed species, including, but not limited to, rangeland and  
14 other birds. They enjoy utilizing these species for recreational, aesthetic, and other uses, and  
15 intend to continue to visit those habitats and enjoy those species and the ecosystem services they  
16 provide.

17 33. EPA's failure to provide Public Interest Group Plaintiffs with the FIFRA-  
18 mandated notices of applications for the clothianidin and thiamethoxam registration and changed  
19 uses in the Federal Register, and its failure to provide public comment periods, denied the Public  
20 Interest Group Plaintiffs the ability to submit information to EPA that may have convinced the  
21 agency not to issue those registrations or change amendments. Defendants' failure to adequately  
22 regulate clothianidin and thiamethoxam under FIFRA and the ESA, and failure to provide  
23 adequate label warnings on these pesticides, resulting in the ongoing collapse of populations of  
24 honey bees and other beneficial insects and the continued harm to threatened and endangered  
25 species, further injure Public Interest Group Plaintiffs' organizational interests as well as their  
26 members' aesthetic, recreational, and economic interests. The relief sought in this case will  
27 provide redress for the ongoing harm to Public Interest Group Plaintiffs and their members.  
28

1 ***Defendants***

2 34. Defendant Steven P. Bradbury is the Director of the Office of Pesticide Programs  
3 of EPA, and is being sued in his official capacity.

4 35. Defendant Bob Perciasepe is the Acting Administrator and Deputy Administrator  
5 of EPA, and is being sued in his official capacity.

6 36. Defendants Bradbury and Perciasepe are collectively referred to as EPA or  
7 Defendants.

8 **STATUTORY BACKGROUND**

9 ***Federal Insecticide, Fungicide, and Rodenticide Act***

10 37. Under the FIFRA, EPA licenses the sale, distribution, and use of pesticides  
11 through the process of registration. 7 U.S.C. § 136a. The Administrator is required to provide  
12 public notice and comment opportunities under 7 U.S.C. § 136a(c)(4):

13 Notice of application.

14 The Administrator shall publish in the Federal Register, promptly after  
15 receipt of the statement and other data required pursuant to paragraphs (1)  
16 and (2), a notice of each application for registration of any pesticide if it  
17 contains any new active ingredient or if it would entail a changed use  
pattern. The notice shall provide for a period of 30 days in which any  
Federal agency or any other interested person may comment.

18 38. EPA's FIFRA-implementing regulations also impose several procedural  
19 requirements, including, but not limited to, requiring publication of two classes of notices in the  
20 Federal Register. Under 40 C.F.R. § 152.102:

21 The Agency will issue in the Federal Register a notice of receipt of each  
22 application for registration of a product that contains a new active ingredient or  
23 that proposes a new use. After registration of the product, the Agency will issue in  
24 the Federal Register a notice of issuance. The notice of issuance will describe the  
25 new chemical or new use, summarize the Agency's regulatory conclusions, list  
missing data and the conditions for their submission, and respond to comments  
received on the notice of application.

26 *Id.* (emphases added).

27 39. The FIFRA authorizes Defendants to register a pesticide product without any  
28 conditions (unconditional registration) if Defendants determine that the product "will perform its

1 intended function without unreasonable adverse effects on the environment,” and that “when  
 2 used in accordance with widespread and commonly recognized practice” the pesticide “will not  
 3 generally cause unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(c)(5)(C)-  
 4 (D).

5 40. The FIFRA authorizes Defendants to register a pesticide product with conditions  
 6 (conditional registration) if Defendants determine that the pesticide or proposed new use is so  
 7 new that insufficient data exists to support unconditional registration under 7 U.S.C.  
 8 § 136a(c)(5), provided that the registrants meet Defendants’ conditions, and conduct and supply  
 9 studies to fill the missing data gaps within a set timeframe. 7 U.S.C. § 136a(c)(7)(C). A  
 10 conditional registration is authorized under three circumstances: 1) EPA may conditionally  
 11 register a pesticide if “the pesticide and proposed use are identical or substantially similar to any  
 12 currently registered pesticide and use thereof, or differ only in ways that would not significantly  
 13 increase the risk of unreasonable adverse effects on the environment, and [] approving the  
 14 registration . . . would not significantly increase the risk of any unreasonable adverse effect on  
 15 the environment,” 7 U.S.C. § 136a(c)(7)(A); 2) EPA may conditionally amend a pesticide’s  
 16 registration “to permit additional uses of such pesticide notwithstanding that data concerning the  
 17 pesticide may be insufficient to support an unconditional amendment,” 7 U.S.C. § 136a(c)(7)(B);  
 18 and 3) EPA may conditionally register a pesticide “containing an active ingredient not contained  
 19 in any currently registered pesticide for a period reasonably sufficient for the generation and  
 20 submission of required data” but “only if [EPA] determines that use of the pesticide during such  
 21 period will not cause any unreasonable adverse effect on the environment, and that use of the  
 22 pesticide is in the public interest,” 7 U.S.C. § 136a(7)(C) (emphasis added).

23 41. Under the FIFRA, a conditional registration may only last for a period  
 24 “reasonably sufficient” to generate the outstanding data necessary for unconditional registration.  
 25 7 U.S.C. § 136a(c)(7)(C).

26 42. EPA has the authority to cancel a pesticide registration whenever “a pesticide or  
 27 its labeling . . . does not comply with the provisions of [the FIFRA] or, when used in accordance  
 28

1 with widespread and commonly recognized practice, generally causes unreasonable adverse  
2 effects on the environment.” 7 U.S.C. § 136d(b).

3 43. EPA may immediately suspend a pesticide registration to prevent an “imminent  
4 hazard.” 7 U.S.C. § 136d(c). The phrase “imminent hazard,” as defined in the FIFRA, means a  
5 situation “when the continued use of a pesticide during the time required for cancellation  
6 proceeding would be likely to result in unreasonable adverse effects on the environment or will  
7 involve unreasonable hazard to the survival of a species declared endangered” under the ESA.  
8 7 U.S.C. § 136(l).

9 44. If a registrant has failed to fulfill any condition imposed on the registration, the  
10 Administrator “shall” initiate cancellation proceedings. 7 U.S.C. § 136d(e)(1). While  
11 cancellation is pending, EPA may suspend the registration of the pesticide or new use  
12 immediately if an “imminent hazard” exists, that is, if “continued use of a pesticide during the  
13 time required for cancellation proceeding would be likely to result in unreasonable adverse  
14 effects on the environment or will involve unreasonable hazard to the survival of a species  
15 declared endangered or threatened by the Secretary [of the Interior] pursuant to the Endangered  
16 Species Act of 1973.” 7 U.S.C. §§ 136d(c), 136(l).

17 45. The culmination of the registration process is EPA’s approval of a label for the  
18 pesticide, including use directions and appropriate warnings on safety and environmental risks.  
19 It is a violation of the FIFRA for any person to sell or distribute a “misbranded” pesticide.  
20 7 U.S.C. § 136j(a)(1)(E). A pesticide is misbranded if the “labeling accompanying it does not  
21 contain directions for use which . . . if complied with . . . are adequate to protect health and the  
22 environment.” 7 U.S.C. § 136(q)(1)(F).

23 46. The FIFRA registrations for clothianidin and thiamethoxam products amount to  
24 licenses that establish the terms and conditions under which the products may be lawfully sold,  
25 distributed, or used. EPA retains the ongoing authority to modify the terms and conditions of  
26 these licenses as needed; thus, each pesticide registration constitutes an ongoing agency action.  
27 *See* 7 U.S.C. §§ 136d(c), 136(l).



1           47.     The legal burden of showing that any pesticide and any approved uses thereof  
 2 meet the FIFRA criteria to be eligible for continued registration rests with the products’  
 3 proponents. *See* 40 C.F.R. § 154.5.

4 ***Endangered Species Act***

5           48.     The ESA requires EPA, in consultation with U.S. Fish and Wildlife Service  
 6 (FWS), to ensure that any action authorized by the agency is not likely to jeopardize the  
 7 continued existence of any threatened or endangered species, or result in the destruction or  
 8 adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). For each  
 9 federal action, EPA must request information from FWS indicating whether any listed or  
 10 proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50  
 11 C.F.R. § 402.12. If listed or proposed species may be present, EPA must prepare a “biological  
 12 assessment” to determine whether the listed species may be affected by the proposed action. 16  
 13 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

14           49.     If EPA determines that its proposed action may affect any listed species or critical  
 15 habitat, the agency must engage in formal consultation with FWS. Effects determinations are  
 16 based on the direct, indirect, and cumulative effects of the action when added to the  
 17 environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02.  
 18 An agency is required to review its actions “at the earliest possible time” to determine whether  
 19 the action may affect listed species or critical habitat. 50 C.F.R. § 402.14(a). Because EPA  
 20 retains ongoing discretionary authority to modify the terms and conditions of its approvals, the  
 21 agency’s continuing authority over pesticide registrations constitutes ongoing agency action and  
 22 it has a continuing obligation to follow the requirements of the ESA.

23           50.     To complete formal consultation, FWS must provide EPA with a “biological  
 24 opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C.  
 25 § 1536(b). If FWS concludes the proposed action will jeopardize the continued existence of a  
 26 listed species, the biological opinion must outline “reasonable and prudent alternatives.”  
 27 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes the action is not likely to  
 28 jeopardize the continued existence of a listed species, and will not result in the destruction or

adverse modification of critical habitat, FWS must provide an incidental “take” statement specifying the impact of such incidental taking on the listed species and any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and also setting forth the “terms and conditions” that must be complied with by EPA to implement those measures. 16 U.S.C. § 1536(b)(4).

51. “Take” is defined broadly to include actions that “harass, harm, pursue, hunt, shoot, wound, [or] kill” a protected species, either through direct action or by degrading its habitat. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3. In furtherance of Congress’s goal to conserve species, the ESA generally prohibits the “take” of any species listed as endangered, a prohibition FWS has extended by regulation to threatened species. 16 U.S.C. § 1538(a)(1)(B); *see also* 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. However, take that complies with the terms and conditions specified in a biological opinion is not prohibited. 16 U.S.C. § 1536(o)(2).

52. During consultation with FWS, EPA is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

53. Section 7 of the ESA also requires EPA, in consultation with and with the assistance of FWS, to utilize its authority in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered and threatened species. 16 U.S.C. § 1536(a)(1).

#### ***Administrative Procedure Act***

54. The APA provides for judicial review of final agency actions. “Agency action” is defined to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). The APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

55. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions” that it finds to be “arbitrary, capricious, an abuse of discretion,

1 or otherwise not in accordance with the law” or “without observance of procedure required by  
2 law.” 5 U.S.C. § 706(2)(A), (D).

3 56. Further, under the APA, a reviewing court has the authority to “compel agency  
4 action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

### 5 **STATEMENT OF FACTS**

#### 6 ***Honey Bee Impact Facts***

7 57. Clothianidin and thiamethoxam are systemic insecticides that are formulated and  
8 sold as a large number of branded products aimed at a variety of agricultural, landscaping, and  
9 residential use markets. They are taken up by a plant’s vascular system as it grows and are  
10 expressed through its tissues, including flowers, pollen, and nectar. They share a common mode  
11 of action that damages the central nervous system of honey bees. When bees forage on pollen or  
12 nectar from treated crops and other plants, or are otherwise exposed to even extremely small  
13 levels of these compounds, paralysis and death can result. Over the past decade, the proliferating  
14 use of the neonicotinoid class of pesticides has coincided with mass die-offs of honey bee  
15 populations in the phenomenon known as Colony Collapse Disorder, documented as early as  
16 2003–2004 in the United States, with the first reported case findings in 2006.

17 58. Clothianidin is a transformation product of thiamethoxam. In honey bees,  
18 thiamethoxam is metabolized into clothianidin. In short, the two are closely related with  
19 comparable applications, toxicity, and effects.

20 59. Clothianidin and thiamethoxam affect bee behavior and cognition in ways that  
21 compromise the overall health of colonies, often causing bee colonies to collapse. Honey bees  
22 are social insects that rely heavily on memory, cognition, and communication to coordinate  
23 activities essential for their survival. Chronic ingestion of neonicotinoids damages foraging  
24 behavior, overall mobility, and the communication by which they coordinate their activities.  
25 Neonicotinoid pesticides can also have several other indirect effects on honey bees, such as  
26 causing premature shifts in hive roles. They can impair honey bees’ medium-term olfactory  
27 memory and associative learning abilities, which foraging honey bees rely on, *inter alia*, to find  
28 their way back to the hive.

1           60.     Neonicotinoid pesticides such as clothianidin and thiamethoxam persist in a toxic  
2 state in the environment for several years, increasing the risk of cumulative toxic loading effects,  
3 especially after repeat applications at the same location. No label warnings or use directions are  
4 capable of mitigating these impacts and those warnings and directions that do exist are almost  
5 never enforced. Farmers and other users are known to ignore them in many cases, yet  
6 enforcement cases by EPA and its cooperating state agencies are exceedingly rare.

7           61.     Due to EPA's actions and inactions alleged herein, clothianidin and  
8 thiamethoxam are spread widely throughout hundreds of millions of acres of both agricultural  
9 and neighboring lands. The neighboring lands are where these toxic compounds are not intended  
10 to be and often are lands not owned by the farmers applying the compounds. These lands  
11 adjacent to agricultural fields in many cases are prime remaining bee and native insect habitats.  
12 Due to the long persistence of these compounds and the uncontrollable drifting and blowing of  
13 contaminated dust and soil, bees and other insects are victims of multiple exposure pathways that  
14 EPA failed to assess when the agency approved the pesticides—and still has failed to assess.  
15 Key among these exposure pathways are residues in pollen and nectar, dust from treated seeds  
16 and soils, planter exhaust, untreated but contaminated non-crop plants adjacent to treated fields,  
17 contaminated puddles in fields and adjacent surface water, guttation droplets on both treated and  
18 untreated but contaminated plants, and residues from foliar uses.

19           62.     EPA's own scientists have regularly described severe impacts of these  
20 insecticides in their internal risk assessments. Recent studies, including those by the U.S.  
21 Department of Agriculture (USDA)'s lead bee scientists, also confirm that neonicotinoids  
22 interact with common bee pathogens and parasites, making them more vulnerable to the deadly  
23 effects of both, leading to further colony collapse. Numerous recent peer-reviewed studies and  
24 other evidence of both acute and sub-lethal harm to bees from a variety of exposure pathways  
25 across diverse agricultural landscapes support the need to suspend the uses of clothianidin and  
26 thiamethoxam. EPA has failed to take this new science into account in: a) deciding whether an  
27 "imminent hazard" exists requiring suspension of these pesticides; b) determining the adequacy  
28

1 of the pesticide products' labeling under FIFRA; and c) initiating and completing consultation  
2 regarding potential impacts on federally-listed threatened and endangered species under the ESA.

3 63. Other nations, including Austria, Italy, France, Germany, Slovenia, and Sweden,  
4 and recently the European Union as a whole, have recognized the imminent harm of seed  
5 treatment and other uses of clothianidin and thiamethoxam and suspended or restricted those  
6 uses. In past cases, these actions restricting or suspending the uses of clothianidin and  
7 thiamethoxam have generally allowed honey bee colonies to thrive.

8 64. EPA has maintained the active registrations of clothianidin and thiamethoxam  
9 products despite known risks and data gaps. The European Food Safety Authority has issued  
10 authoritative reports that confirm that clothianidin and thiamethoxam products present acute  
11 risks to honey bee survival—risks that the European Food Safety Authority characterized as  
12 having been underestimated and inadequately researched by national pesticide regulators. A  
13 high acute risk to honey bees was identified from exposure via dust drift for the authorized uses  
14 in cereals and cotton (thiamethoxam), corn and canola (thiamethoxam and clothianidin), cereals  
15 (clothianidin), and sunflowers (thiamethoxam—except for uses with the lowest application rate  
16 authorised in the European Union). A high acute risk was also identified for exposure via  
17 residues in nectar and/or pollen for the authorized uses in canola (clothianidin), and corn  
18 (thiamethoxam). Other risks and major data gaps were identified. The same risks and data gaps  
19 exist in the United States.

20 65. EPA has suggested non-mandatory best management practices (BMPs) that it  
21 might promote to reduce the unreasonable adverse environmental effects of thiamethoxam and  
22 clothianidin. However, EPA lacks authority to mandate adherence to all of the needed  
23 technological fixes and BMPs. EPA officials have publicly stated they lack comprehensive  
24 enforcement power under the FIFRA to prevent farmers from killing bees and other pollinators  
25 via the contaminated dust pathway associated with planting treated seeds. Even if they had such  
26 authority, the time lag for the hundreds of thousands of users of clothianidin and thiamethoxam  
27 products to be able to comply is such that the unreasonable adverse environmental effects would  
28 continue for many years unless use of these products is suspended in the interim. EPA's

1 suggested non-mandatory BMPs are inadequate for purpose of compliance with the FIFRA and  
2 the ESA.

3         66. As a result, clothianidin- and thiamethoxam-treated seeds will continue to be  
4 planted across hundreds of millions of acres in 2013 and beyond. To date, EPA has provided no  
5 formal direction or label changes to farmers on how to minimize non-target effects, how and  
6 where to clean out crop planters, or what steps to take to avoid effects to nearby honey bees or  
7 insect-pollinated plants. Consequently, Defendants have allowed the imminent hazard to  
8 continue to occur, in particular as corn and other crops are planted in the spring season. Since  
9 the original filing of this case in March 2013, at least two of the Beekeeper and Honey Producer  
10 Plaintiffs, and numerous other beekeepers across the nation, have experienced increased  
11 mortality of their managed beehives due to this ongoing hazard, as corn and other crops are  
12 planted in the months of April and May. One Beekeeper and Honey Producer Plaintiff, Jim  
13 Doan, was driven out of his farm business in May 2013 because of increased mortality of his  
14 bees from exposure to these neonicotinoid pesticides.

15         67. The winter of 2012-2013 was the worst year in recent years for bee mortality,  
16 with official USDA estimates exceeding 30% bee loss, but with several of the Beekeeper and  
17 Honey Producer Plaintiffs and numerous other beekeepers across the nation experiencing much  
18 worse, with 40%, 60%, and up to 100% bee losses.

19         68. The extremely valuable and required service of almond crop pollination in  
20 California, which requires millions of bee colonies, almost failed in January through March of  
21 2013 due to lack of viable colonies. Experts have identified systemic neonicotinoid insecticide  
22 use is a major contributing factor to the shortage of viable pollinators and honey bee populations,  
23 in combination with other factors. Experts have identified the potential for foreseeable “domino  
24 effects” of cascading inadequate crop pollination due to shortages of viable pollinators. This  
25 could rapidly evolve into devastating, perhaps irreversible, losses to farmers, consumers, and the  
26 economy as a whole, since all rely on domestically-produced bee-pollinated food and fiber crops.  
27 The future of commercial beekeeping is in jeopardy. Economic losses from the collapse of U.S.  
28 bee colonies used in agriculture would measure in the several tens of billions of dollars. The

1 ecological, agricultural, landscaping, and horticultural impacts of lost managed and wild  
2 pollinators would be devastating and perhaps irreparable.

3 69. In recent months, EPA officials have made key public admissions at public  
4 meetings, in media statements, in EPA documents, and at other venues. They have admitted that  
5 a) EPA's enforcement guidance for neonicotinoid use is inadequate; b) EPA's bee kill incident  
6 reporting system is inadequate; and that c) the labels on neonicotinoid products are inadequate to  
7 mitigate adverse environmental effects, including the risk of seed dust-mediated mortality to  
8 honey bees and other beneficial insects in or near corn fields. EPA officials have publicly  
9 recognized the current corn planting machinery poses significant risks and needs changing, while  
10 also recognizing that such changes will likely take many years and stating that EPA lacks  
11 authority to mandate machinery changes. Despite these and other key admissions about the  
12 current crisis in bee health, EPA has refused to exercise its regulatory power to address the one  
13 factor it could address immediately—the major contribution of clothianidin and thiamethoxam to  
14 bee declines.

15 70. The efficacy of clothianidin and thiamethoxam seed treatments and other uses are  
16 highly debated. Despite claims of benefits by the registrants and in public statements by EPA  
17 officials, many recent studies indicate that they provide no yield benefit in many cases and their  
18 prophylactic use exacts severe costs to beneficial insects, biological control agents, and  
19 ecosystems. In sum, their costs to the nation as a whole exceed their benefits.

#### 19 ***Non-Honey Bee Impact Facts***

20 71. Besides honey bees, there are thousands of other U.S. native bee and other insect  
21 species that EPA has a duty to conserve, including, but not limited to, the rusty patched bumble  
22 bee, Franklin's bumble bee, yellow-banded bumble bee, and Western bumble bee, as well as  
23 non-bee insects such as butterflies, ladybugs and lacewings, dragonflies, and hoverflies. Several  
24 of these species are facing severe declines comparable to, or worse than, those faced by honey  
25 bees. Clothianidin and thiamethoxam are documented to be highly toxic to other bee species like  
26 the common Eastern bumble bee, alfalfa leafcutter bee, and blue orchard bee, all of which are  
27 valuable plant pollinators. There are numerous other beneficial insects and other invertebrates  
28



that are severely impacted by use of clothianidin and thiamethoxam. Broad recognition exists, including by EPA, that there is insufficient data to assess the impacts of clothianidin and thiamethoxam use on the behavior, reproduction, and survival of these vital pollinators and insect species.

72. EPA has never done a thorough effects analysis of the numerous thiamethoxam or clothianidin uses it has approved for any federally-listed threatened and endangered species under the ESA, and EPA similarly has failed to assess potential adverse modification of designated critical habitat. It also has failed to consult with FWS as required under the ESA.

73. More than fifteen threatened or endangered insects, including, but not limited to, plant pollinators, ranging from beetles to butterflies to grasshoppers and other taxa, are potentially directly affected by the use of clothianidin and thiamethoxam products. By way of illustration, these species include, but are not limited to (followed by their listing dates; the vast majority were listed prior to the dates of EPA's actions at issue in this First Amended Complaint):

American burying beetle ( <i>Nicrophorus americanus</i> )	07/13/1989
Behren's fritillary ( <i>Speyeria zerene behrensii</i> )	12/05/1997
Callippe silverspot ( <i>Speyeria callippe callippe</i> )	12/05/1997
Delhi Sands flower-loving fly ( <i>Rhaphiomidas terminatus abdominalis</i> )	09/23/1993
Fender's blue ( <i>Icaricia icarioides fenderi</i> )	01/25/2000
Hine's emerald dragonfly ( <i>Somatochlora hineana</i> )	01/26/1995
Karner blue ( <i>Plebejus melissa samuelis</i> )	12/14/1992
Kern primrose sphinx moth ( <i>Euproserpinus euterpe</i> )	04/08/1980
Lange's metalmark ( <i>Apodemia mormo langei</i> )	06/01/1976
Mitchell's satyr butterfly ( <i>Neonympha mitchellii mitchellii</i> )	05/20/1992
Myrtle's silverspot ( <i>Speyeria zerene myrtleae</i> )	06/22/1992
Northeastern beach tiger beetle ( <i>Cicindela dorsalis dorsalis</i> )	08/07/1990
Ohlone tiger beetle ( <i>Cicindela ohlone</i> )	10/03/2001
Quino checkerspot butterfly ( <i>Euphydryas editha quino</i> )	01/16/1997
Salt Creek tiger beetle ( <i>Cicindela nevadica lincolniiana</i> )	10/06/2005
San Bruno elfin ( <i>Callophrys mossii bayensis</i> )	06/01/1976
Schaus swallowtail ( <i>Papilio aristodemus ponceanus</i> )	listed as threatened 4/22/1975; as endangered 8/31/1984

Zayante band-winged grasshopper  
(*Trimerotropis infantilis*)

01/24/1997

More insect species are regularly listed and numerous “Candidate” species, including native bees, await further action.

74. Harmful direct, indirect, and cumulative effects on many other non-insect ESA-listed species, including, but not limited to, birds, crustaceans, mollusks, fish, mammals, reptiles, and amphibians, are also foreseeable due to the known effects of clothianidin and thiamethoxam. Listed species may be affected by direct consumption of clothianidin- and thiamethoxam-treated seeds and plant parts, as well as by food chain and ecosystem collapses associated with the vast mortality caused by these pesticides to aquatic and terrestrial invertebrates. EPA has not made the required “effects” determinations or consulted with FWS for any listed species or their critical habitats.

75. In its initial conditional registration of clothianidin, EPA recognized that compliance with the ESA is necessary:

Clothianidin is expected to present acute and/or chronic toxicity risk to endangered/threatened birds and mammals via possible ingestion of treated corn and canola seeds. Endangered/threatened non-target insects may be impacted via residue laden pollen and nectar. The potential use sites cover the entire U.S. because corn is grown in almost all U.S. states.<sup>8</sup>

EPA has made the same admissions in its thiamethoxam documentation.<sup>9</sup>

76. For at least one neonicotinoid insecticide, FWS scientists are on record stating “EPA is ignoring their duties with respect to consulting with FWS.”<sup>10</sup> This is in fact true for all thiamethoxam and clothianidin product approvals subject to this Action. According to EPA documents, there are hundreds of federally-listed threatened and endangered species occurrences

<sup>8</sup> EPA, Pesticide Fact Sheet: Clothianidin, Conditional Registration 16 (May 30, 2003), *available at* [http://www.epa.gov/opp00001/chem\\_search/reg\\_actions/registration/fs\\_PC-044309\\_30-May-03.pdf](http://www.epa.gov/opp00001/chem_search/reg_actions/registration/fs_PC-044309_30-May-03.pdf).

<sup>9</sup> *See, e.g.*, EPA, Thiamethoxam Summary Document Registration Review: Initial Docket 5 (Dec. 2011), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2011-0581-0002>.

<sup>10</sup> E-mail from Ken Dickerson, Environmental Contaminants Biologist, FWS, to Nancy Golden, FWS, regarding initiating informal consultation on rodenticide new uses (Jan. 3, 2012) (on file with Plaintiffs).

1 in states where clothianidin and thiamethoxam are used in which direct or indirect effects are  
2 foreseeable, but EPA has disregarded those effects determinations with respect to the ESA § 7  
3 consultation requirements.

4 77. In March 2013, the American Bird Conservancy of Washington, D.C., released a  
5 highly relevant scientific report, *The Impact of the Nation's Most Widely Used Insecticides on*  
6 *Birds*.<sup>11</sup> It was researched and written by a recognized independent avian toxicologist, Pierre  
7 Mineau, Ph.D. In the report, Dr. Mineau examines the key EPA risk assessment documents and  
8 finds numerous critical errors and failures related to risks to birds in the agency's approvals of  
9 clothianidin and thiamethoxam products. The report shows high direct and indirect mortality  
10 risks to a broad suite of birds, as well as to aquatic invertebrates and to ecosystems generally. It  
11 finds that the observed acute threats to aquatic invertebrates from water contamination by EPA-  
12 approved neonicotinoids "may be totally unprecedented in the history of pesticide registration."  
13 *Id.* at 57. It also states: "Simply put, EPA has not been heeding the warnings of its own  
14 toxicologists." *Id.* at 65. In the report, Dr. Mineau examines the EPA-approved product labels  
15 and finds them inadequate to address the risks to birds. The report states: "regulators are clearly  
16 mistaken in believing that exposure to [neonicotinoid] treated seed can be minimized by label  
17 statements or adherence to good agricultural practices." *Id.* at 27. The report describes EPA's  
18 analysis of avian risks as "scientifically unsound," arbitrary, and capricious. It urges, *inter alia*,  
19 the agency to suspend use of these products until the risks are resolved and to ban seed  
20 treatments altogether.

21 78. Recently published water quality studies have indicated that neonicotinoid  
22 insecticide pollution occurring in surface waters has a strong negative effect on aquatic  
23 invertebrate life, with potentially far-reaching consequences for the food chain and ecosystem  
24  
25

---

26 <sup>11</sup> Dr. Pierre Mineau and Cynthia Palmer, Am. Bird Conservancy, *The Impact of the Nation's*  
27 *Most Widely Used Insecticides on Birds* (Mar. 2013), available at  
28 [http://www.abcbirds.org/abcprograms/policy/toxins/Neonic\\_FINAL.pdf](http://www.abcbirds.org/abcprograms/policy/toxins/Neonic_FINAL.pdf).

functions. EPA's approvals of the numerous thiamethoxam and clothianidin products failed to consider these threats.

### ***Procedural Background Facts***

79. Since 2000 and 2003, respectively, EPA has registered approximately more than 100 total thiamethoxam and clothianidin insecticide uses and products under FIFRA. *See* Appendices A and B. On information and belief, these are as indicated in Appendix A – Clothianidin (thirty-five products) and B – Thiamethoxam (sixty-eight products), which are incorporated into this Complaint by this reference. Other registrations are believed to exist; however, due to EPA's failure to publish required notices in the Federal Register, there is a lack of accurate and clear public records. On information and belief, for the vast majority of clothianidin and thiamethoxam registrations and changed use approvals, EPA did not, as required under the FIFRA, 7 U.S.C. § 136a(c)(4) and 40 C.F.R. § 152.102, announce a "notice of receipt of application" or a "notice of issuance" in the Federal Register or in any other public order or hearing.

80. Additionally, on information and belief, for each of the thiamethoxam and clothianidin insecticide uses and products, EPA failed this requirement under the FIFRA: "within 30 days after the Administrator registers a pesticide under this Act the Administrator shall make available to the public the data called for in the registration statement." 7 C.F.R. § 136a(c)(2)(A).

81. Together with a coalition of beekeepers and public interest groups, Plaintiff Beyond Pesticides delivered a letter to Defendants dated December 8, 2010, requesting suspension of clothianidin's registration due to inadequate data on impacts to pollinators and excessive agency delay in ensuring compliance with that condition.<sup>12</sup> By letter of February 18, 2011, Defendants refused that suspension request.<sup>13</sup>

---

<sup>12</sup> *See* Letter from Beyond Pesticide *et al.*, *supra* note 1.

<sup>13</sup> *See* Letter from Steven Bradbury, *supra* note 2.

1           82.     Plaintiffs CFS, Beyond Pesticides, Steve Ellis, and Tom Theobald, along with a  
2 coalition of beekeepers and honey producers, and other public interest groups, submitted the  
3 Clothianidin Legal Petition to EPA to suspend the registration of clothianidin on March 20, 2012  
4 (Docket No. EPA-HQ-OPP-2012-0334), rooted in the nine-year unreasonable delay in ensuring  
5 full compliance with the “conditional registration” conditions for clothianidin products.<sup>14</sup> They  
6 followed that Petition with two supplemental filings, dated May 3, 2012, and June 18, 2012,  
7 respectively.<sup>15</sup> These consisted of information that came to light after the Petition was filed,  
8 including critical new data on how certain uses of clothianidin constitute an “imminent hazard”  
9 to honey bees and other beneficial insects that compelled a decision to promptly suspend  
10 clothianidin’s registration.

11           83.     By letter dated July 17, 2012, Defendants denied the portion of the Petition that  
12 alleged an “imminent hazard” existed.<sup>16</sup> That letter indicated EPA did not consider the May 3,  
13 2012 and June 18, 2012 supplemental filings in making that decision. To date, the agency has  
14 yet to issue a decision based on the supplemental evidence showing imminent hazard or on any  
15 of the other new science and extensive mass honey bee kill data that emerged after the Petition  
16 was filed.

17           84.     Defendant Bradbury’s letter of July 17, 2012, stated his denial of the imminent  
18 hazard claim in the Petition was EPA’s “final action pursuant to section 16 of FIFRA” with  
19 respect to that claim. There was no Federal Register notice, no public hearing, and no  
20 opportunity for notice and comment prior to this final action. The EPA has yet to resolve any of  
21 the remaining claims in the Petition or to reconsider its denial of an “imminent hazard” based on  
22 the full administrative record before it.

23           85.     The evidence Plaintiffs provided in the Clothianidin Legal Petition and in their  
24 supplemental filings described an “unreasonable adverse effect on the environment” in terms of  
25

---

26 <sup>14</sup> See Clothianidin Legal Petition, *supra* note 3.

27 <sup>15</sup> On file with Plaintiff CFS; see Docket No. EPA-HQ-OPP-2012-0334, *available at*  
<http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OPP-2012-0334>.

28 <sup>16</sup> See Letter from Steven Bradbury, *supra* note 4.

1 a vast number of bee kills impacting likely many hundreds of U.S. and Canadian colonies and  
2 tens of millions of valuable honey bees. These acute bee kills, which were ongoing during  
3 EPA's decision-making period on the Petition, are in addition to the ongoing chronic impacts of  
4 clothianidin. EPA's July 17, 2012 letter admitted the agency did not consider the ongoing bee  
5 kills associated with spring corn planting or any other information received after May 3, 2012,  
6 including the numerous clothianidin-related bee kills during the ten weeks between May 3, 2012  
7 and July 17, 2012.

8 86. Additionally, EPA's response letter and related documentation showed the agency  
9 did not conduct any analysis of clothianidin's effects on endangered or threatened species and  
10 failed to consult with FWS regarding its final agency action denying an imminent hazard.

11 87. Virtually all the information Plaintiffs have filed with respect to the various risks  
12 of clothianidin also apply to its precursor compound, the very similar insecticide thiamethoxam.

13 88. On October 16, 2012, Plaintiffs CFS, Beyond Pesticides, and Steve Ellis delivered  
14 a letter to Defendants on thiamethoxam, setting forth how that compound raises risks that are  
15 essentially equivalent to the risks of clothianidin and seeking a suspension of its registration as  
16 well.<sup>17</sup> That letter cited to new evidence about the dangers of thiamethoxam, including direct  
17 bee kills suffered by Plaintiff Steve Ellis that EPA itself attributed to thiamethoxam and/or  
18 clothianidin in an official Incident Report. While EPA acknowledged receipt of the letter, by a  
19 response letter to CFS dated February 27, 2013, EPA has refused that suspension request also.<sup>18</sup>

20 89. On September 6, 2012, Plaintiffs CFS, Beyond Pesticides, the Sierra Club, Steve  
21 Ellis, and Tom Theobald filed a "Sixty-Day Notice of Intent to Sue Pursuant to the Endangered  
22 Species Act regarding Registration and Use Approvals of Clothianidin and Thiamethoxam,  
23 Neonicotinoid Insecticides," with Defendant Perciasepe's predecessor (Lisa Jackson) and Ken  
24 Salazar, the former Secretary of the Interior, U.S. Department of the Interior.<sup>19</sup> More than sixty  
25

---

26 <sup>17</sup> See Letter from Plaintiffs, *supra* note 5.

27 <sup>18</sup> See Letter from EPA, *supra* note 6.

28 <sup>19</sup> See Sixty-Day Notice Letter, *supra* note 7.

1 days have passed since the Sixty-Day Notice Letter, which sought suspension of the registrations  
 2 involved, and neither EPA nor the Department of the Interior has responded or resolved the  
 3 ongoing ESA violation concerns raised in the Sixty-Day Notice Letter.

4 ***EPA Registration Process Facts***

5 90. More than ten years ago, in February 2003, EPA issued a Risk Assessment for  
 6 clothianidin seed treatment for corn and canola.<sup>20</sup> EPA scientists raised serious concerns about  
 7 the compound and called for a field test evaluating its environmental hazards prior to  
 8 registration, specifically citing harm to pollinators:

9 The possibility of toxic exposure to nontarget pollinators through the translocation  
 10 of clothianidin residues that result from seed treatment (corn and canola) has  
 11 prompted EFED [the EPA Environmental Fate and Effects Division] to require  
 12 field testing that can evaluate the possible chronic exposure to honey bee larvae  
 13 and queen. In order to fully evaluate the possibility of this toxic effect, a  
 14 complete worker bee life cycle study must be conducted, as well as an evaluation  
 15 of exposure and effects to the queen.<sup>21</sup>

16 91. Less than two months later, in its Addendum to the Risk Assessment in April  
 17 2003, EPA reversed this position, recommending conditional registration while the registrant  
 18 arranged for the required chronic exposure study. In contrast to its prior memorandum, EPA  
 19 decided it would allow the nationwide sale and use of clothianidin while the registrant arranged  
 20 for the study necessary to determine whether its decision would be a grave mistake. EPA  
 21 provided no reason for its reversal; however, the second memorandum confirmed that EPA  
 22 determined a study evaluating the long term toxicity to pollinators was necessary as a condition  
 23 for registration. To date, for clothianidin, the requirement of a complete and adequate life cycle  
 24 study, and evaluation of exposure and effects to the queen bee, remains unmet. This also applies  
 25 in the case of thiamethoxam, as EPA's pollinator field test conditions for it incorporated and  
 26 mirrored the conditions imposed for clothianidin.

---

27 <sup>20</sup> Memorandum: Risk Assessment for the Seed Treatment of Clothianidin 600FS on Corn and  
 28 Canola, PC Code 044309, EPA Environmental Fate and Effects Division 2 (Feb. 20, 2003),  
 available at [http://www.epa.gov/pesticides/chem\\_search/cleared\\_reviews/csr\\_PC-044309\\_20-](http://www.epa.gov/pesticides/chem_search/cleared_reviews/csr_PC-044309_20-Feb-03_a.pdf)  
 Feb-03\_a.pdf.

<sup>21</sup> *Id.* at 2.



1           92.     On June 20, 2012, without a hearing, EPA issued a conditional registration to  
 2 Syngenta Crop Protection for CruiserMaxx Vibrance Cereals, produced from thiamethoxam.  
 3 The approval document states:

4           Field Test for Pollinators (test guideline 850[.]3040)[:] An acceptable study must  
 5 be submitted or cited no later than the time this study is required to be submitted  
 6 or cited for current thiamethoxam registrations.<sup>22</sup>

7           93.     This is a vague condition in violation of the FIFRA's conditional registration  
 8 requirements because it neither sets nor refers to any limited time period for submitting the  
 9 pollinator field test study originally required nine years prior. It refers to an alleged "time this  
 10 study is required to be submitted or cited for current thiamethoxam registrations" when there is  
 11 no defined period to satisfy the pollinator study condition for the other thiamethoxam  
 12 registrations.<sup>23</sup> EPA's language violates the FIFRA requirement that periods for compliance  
 13 with conditions must be "limited" and is vague, unenforceable, and arbitrary and capricious. On  
 14 information and belief, numerous other thiamethoxam and clothianidin use approvals have the  
 15 same defects.

16           94.     In the case of clothianidin's approval for use on corn and canola, since 2003, at  
 17 least the following additional conditions based on data gaps, beyond the field test for pollinators,  
 18 have remained unsatisfied, according to the most recent EPA records available to Plaintiffs: a)  
 19 Whole Sediment Acute Toxicity Invertebrates, Freshwater; b) Whole Sediment Acute Toxicity  
 20 Invertebrates, Estuarine and Marine; c) Aerobic Aquatic Metabolism; d) Seed Leaching Study;  
 21 and e) Small-Scale Prospective Groundwater Monitoring Study. Numerous other conditions and  
 22 data gaps also remain unsatisfied. The available records are less clear for thiamethoxam, but the  
 23 same defects appear to exist as for clothianidin. Some of these conditions were to have been met  
 24 within three years after being first imposed in 2003 for clothianidin, and two years after being  
 25 first imposed in 2000 for thiamethoxam. Those clothianidin conditions thus are still not met—up

26 <sup>22</sup> EPA, Notice of Pesticide Registration, June 20, 2012, *available at*  
 27 [http://www.epa.gov/pesticides/chem\\_search/ppls/000100-01383-20120620.pdf](http://www.epa.gov/pesticides/chem_search/ppls/000100-01383-20120620.pdf).

28 <sup>23</sup> *Id.*

1 to seven years after their deadline, and the thiamethoxam conditions are still not met—up to  
2 eleven years after their deadline.

3 95. Ten to thirteen years exceeds the amount of time reasonably sufficient to generate  
4 the data needed to satisfy the conditions imposed on the variety of clothianidin and  
5 thiamethoxam products in Appendices A and B, and for EPA to decide the registrations must be  
6 suspended until the conditions are satisfied. *See* 7 U.S.C. § 136a(c)(7)(A). Delays of seven to  
7 eleven years past the original EPA-imposed deadlines are unreasonable and violate FIFRA's  
8 conditional registration requirements.

9 96. EPA's Registration Review process for thiamethoxam recognizes that, thirteen  
10 years after it first approved uses of this compound, the agency still lacks vital information about  
11 its environmental effects. The EPA Registration Review "Thiamethoxam Final Work Plan"  
12 admits the environmental fate database is "only partially fulfilled and several ecological effects  
13 data gaps were also identified."<sup>24</sup> It then lists at least twenty-five tests, studies, and other data  
14 requirements that must be fulfilled, including, but not limited to, such basic information as:

15 850.2100 – Avian oral toxicity with a passerine  
16 850.3030 – Honey bee toxicity of residues on foliage study  
17 850.3040 – Field test for pollinators  
18 850.1735 – Whole sediment acute toxicity invertebrates, freshwater  
19 Special Study – Larval toxicity study (honey bee)  
Special Study – Residues, pollen and nectar  
Special Study – Laboratory (chronic) pollinator feeding study (honey bee)<sup>25</sup>

20 97. The Registration Review documents for clothianidin show substantially identical  
21 information gaps. The minimum level of knowledge required under the conditional registration  
22 provisions of the FIFRA to protect honey bees, other beneficial insects, and ecosystems  
23 generally, from unreasonable adverse effects caused by these two insecticides, does not exist.

24 98. EPA's Registration Review process aims for the year 2018, per the agency's  
25

26 <sup>24</sup> EPA, Thiamethoxam Final Work Plan for Registration Review, June 2012, *available at*  
27 <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2011-0581-0024>.

28 <sup>25</sup> *Id.*

current schedule, before making a decision on the appropriateness of thiamethoxam's and clothianidin's continuing registrations. Several Plaintiffs have formally commented on the dockets for these reviews, stating the schedule is unreasonably slow and inadequate in light of known risks, and urging EPA to commit to completing the reviews no later than the end of 2013, but EPA has refused. EPA has provided no indication that it will fully decide on the pending Clothianidin Legal Petition to suspend clothianidin's registration prior to 2018.

99. Instead, EPA has continued to allow the sale and use of multiple clothianidin and thiamethoxam products even though the registrants failed to satisfy essential registration conditions imposed as early as 2000 that are necessary to support the required "no unreasonable adverse effects on the environment" determination. These conditions are not limited to pollinator field tests; however, the failure to obtain an adequate field test of the impacts of clothianidin or thiamethoxam likely is the most serious source of EPA's injury to the Beekeeper and Honey Producer Plaintiffs.

100. Available EPA records as of November 2012, indicated approximately eleven "pending" outdoor use approvals for clothianidin and thiamethoxam. On information and belief, these include the following registration numbers and names, but others may exist:

Clothianidin

#73049-UIE – VBC3

#73049-UOR – Clothianidin 7.5 MC

#08NC01 – [unnamed]

Thiamethoxam

#100-RUER – A16901B CP

#100-RUEE – Mainspring Insecticide

#100-RUEU – A16901B Turf

#100-RUUU – CruiserMAXX Potato Extreme

#100-RULT – Avicta Complete Beans 500

#100-RULI – Endigo ZCX

#100-RULO – SYT0113

#100-RUAN – SYT0511

101. The agency is likely to approve all of these proposed future uses under its conditional registration review process. 7 U.S.C. § 136a(c)(7). They present the same general risks to Plaintiffs and the environment and the same FIFRA and ESA violations as the already-approved uses.

**FIRST CLAIM*****EPA's Denial of Imminent Hazard from Clothianidin Products Violated the APA***

102. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 101, as though fully alleged herein.

103. EPA's final agency action, in denying an "imminent hazard" existed in response to Plaintiff s' Clothianidin Legal Petition, failed to consider any of Plaintiffs' supplemental filings, the bee kills associated with spring corn planting, or any other information it received after May 3, 2012. Ignoring this information available to the agency, including the hundreds of ongoing clothianidin-related bee kills during the ten week period between May 3 and July 17, 2012, when EPA issued its decision, was arbitrary and capricious. *See* 5 U.S.C. § 706(2).

104. The agency did not fully consider the likelihood of an imminent hazard recurring during the time required for a cancellation or change in classification proceeding, under 7 U.S.C. § 136d(c)(1). The time for such a proceeding is likely up to two years. It was, and remains, foreseeable that hundreds of additional bee kills will be suffered by Plaintiffs and others in the now ongoing 2013 and 2014 spring planting seasons because of EPA's failure to respond based on the full 2012 spring bee kill information. EPA's arbitrary and capricious actions violated the APA, and its failure to reconsider its imminent hazard determination to date, more than one year after the Petition was filed, in view of the risks presented, constitutes unreasonable delay under the APA. *See* 5 U.S.C. § 706(1).

105. EPA's denial of "imminent hazard" has damaged and continues to damage Plaintiffs. Plaintiff beekeepers are suffering severe ongoing economic and personal damages. EPA allowed clothianidin products that are harmful to Plaintiffs to be used that EPA should have suspended; in particular, EPA allowed the continued use of clothianidin seed treatment products that foreseeably would damage the survival of the Beekeeper and Honey Producers' bees during 2013 and 2014.

**SECOND CLAIM*****EPA's Denial of Imminent Hazard for Clothianidin Products Violated the ESA and the APA***

106. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 105, as though fully alleged herein.

107. EPA's final agency action, in denying an "imminent hazard" existed in response to Plaintiff s' Clothianidin Legal Petition, was arbitrary and capricious. EPA's determination that no unreasonable hazard existed to endangered or threatened species, violated the ESA and the APA. The FIFRA's definition of "imminent hazard" includes whether the pesticide "involves unreasonable hazard to the survival of a species declared endangered or threatened by the Secretary [of the Interior] pursuant to the [ESA]." 7 U.S.C. § 136(l). EPA failed to prepare the required effects analysis or to consult with FWS regarding impacts on endangered or threatened species in its final agency action denying an imminent hazard.

108. In addition, EPA's continuing authority over conditional and unconditional clothianidin product registrations constitutes ongoing action, and it has violated its continuing obligation to consider effects on endangered species in determining whether an imminent hazard exists. New scientific information, including the supplemental bee kill data and other scientific information submitted by Petitioner Plaintiffs that EPA failed to consider, shows effects of clothianidin on invertebrates and ecosystems and compels an ESA effects determination and consultation with FWS. EPA's failure to consider effects on endangered species or consult with FWS was arbitrary and capricious.

109. EPA's actions violated § 7(a) of the ESA and were arbitrary and capricious actions under the APA. 5 U.S.C. § 706(2). EPA allowed clothianidin products that are harmful to endangered and threatened species to continue to be used, which EPA should have suspended, and damaged Plaintiffs' interest in avoiding jeopardy to the survival of ESA-listed species and preventing adverse modification of their designated critical habitats.

**THIRD CLAIM*****EPA's Failure to Publish Notices of Pesticide Applications for Clothianidin Products Violated the FIFRA and the APA***

110. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 109, as though fully alleged herein.

111. For the vast majority of clothianidin registrations and changed use approvals, EPA did not, as required, announce a "notice of receipt of application" or a "notice of issuance" in the Federal Register or in any other public order or hearing.

112. As indicated in Appendix A, on information and belief, only four clothianidin registrations had any Federal Register notice of application and none had a notice of issuance. On information and belief, EPA issued the following clothianidin new use registrations without first publishing notices of application or issuance in the Federal Register, in violation of 7 U.S.C. § 136a(c)(4) and 40 C.F.R. § 152.102:

<b>Clothianidin Product Name</b>	<b>EPA Registration Number</b>	<b>Date of Initial Registration</b>
Aloft GC SC Insecticide	66330-365	10/18/2007
Aloft LC SC Insecticide	66330-366	10/18/2007
Aloft GC G Insecticide	66330-367	10/18/2007
Aloft LC G Insecticide	66330-368	10/18/2007
Insecticide TD Concentrate	72155-82	01/28/2008
Flower, Rose, and Shrub Care II	72155-94	08/24/2009
Flower, Rose, and Shrub Care III	72155-95	07/30/2009
Insecticide TD Granule	72155-96	12/28/2009
Poncho 600	264-789	05/30/2003
AE 1283742	264-846	05/30/2007
Titan FL	264-984	07/01/2003
Prosper T400 Insecticide and Fungicide	264-1034	11/14/2006
Seed Treatment		
Prosper T200 Insecticide and Fungicide	264-1035	12/14/2006
Seed Treatment		
Poncho Beta	264-1056	03/07/2008
Three-Way VAP	264-1079	11/21/2008
Sepresto 75 WS	264-1081	04/28/2010
Proceed Plus	264-1082	01/29/2010
Poncho/Votivo	264-1109	03/16/2010
Prosper Evergol	264-1121	05/11/2012

1	Emesto Quantum	264-1125	05/11/2012
	Poncho/GB 126	264-1132	04/29/2011
2	VBC3 Insecticide	73049-482	09/25/2012
	Darlex Insecticide	73049-467	03/18/2010
3	V-10170 16 WSG Insecticide	59639-153 / 66330-52	02/23/2005
	Arena 0.5G	59639-156 / 66330-53	11/30/2004
4	V-10170 0.25G Insecticide	59639-157 / 66330-70	10/02/2006
	V-10170 0.25G GL Insecticide	59639-164	01/27/2009
5	Inovate Seed Protectant	59639-176	06/21/2011
6	NipsIt Suite Cereals of Seed Protectant	59639-183	12/21/2011
	NipsIt Suite Canola Seed Protectant	59639-184	01/06/2012
7	Inovate Neutral Seed Protectant	59639-187	01/25/2012

8 Thus, a number of approvals lacked the public notice and opportunity for public comment  
9 required under 7 U.S.C. § 136a(c)(4) and 40 C.F.R. § 152.102. Those approvals included new  
10 clothianidin uses on crops and habitats where Beekeeper and Honey Producer Plaintiffs' honey  
11 bees foraged and pollinated. Additionally, on information and belief, for each of the clothianidin  
12 insecticide uses and products, EPA also failed to meet this requirement: "within 30 days after the  
13 Administrator registers a pesticide under this Act the Administrator shall make available to the  
14 public the data called for in the registration statement." 7 U.S.C. § 136a(c)(2)(A).

15 113. EPA's failure to provide Plaintiffs with the FIFRA-mandated notices of  
16 application and issuance for the clothianidin registrations and changed uses in the Federal  
17 Register, its denial of public comment opportunities, and its failure to make its registration data  
18 available to the public within thirty days, denied Plaintiffs and the public the ability to submit  
19 information to EPA that may have convinced the agency not to issue those approvals in the first  
20 instance, or to cancel them after they were issued, and denied Plaintiff Beekeepers knowledge  
21 that would have allowed them to protect their honey bees. EPA allowed the use of products that  
22 cause unreasonable adverse effects and are harmful to Plaintiffs.

23 114. EPA's failure to publish the Federal Register notices as required under 7 U.S.C.  
24 § 136a(c)(4) and 40 C.F.R. § 152.102, or to provide data required under 7 C.F.R. § 136a(2)(A),  
25 establishes that these clothianidin products were approved "without observance of procedure  
26 required by law," in violation of the APA. 5 U.S.C. § 706(2)(D).



**FOURTH CLAIM*****EPA's Failure to Publish Notices of Pesticide Applications for Thiamethoxam Products Violated the FIFRA and the APA***

115. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 114, as though fully alleged herein.

116. For the vast majority of thiamethoxam registrations and changed use approvals, EPA did not, as required, announce a "notice of receipt of application" or a "notice of issuance" in the Federal Register or in any other public order or hearing.

117. As indicated in Appendix B, on information and belief, EPA issued the following thiamethoxam new use registrations without first publishing notices of application or issuance in the Federal Register, in violation of 7 U.S.C. § 136a(c)(4) and 40 C.F.R. § 152.102:

<b>Thiamethoxam Product Name</b>	<b>EPA Registration Number</b>	<b>Date of Initial Registration</b>
Xamox Technical	43813-29	10/21/2002
Xamox 30L	43813-30	07/28/2006
Xamox 10TK	43813-31	05/30/2006
Xamox 100 SL	43813-36	05/23/2006
Dyna-Shield Thiamethoxam Fungicide	34704-939	07/10/2006
Agita 1GB Fly Bait	70585-9	12/08/2010
Agita 10 WG	70585-10	12/08/2010
Helix XTra Insecticide with Fungicides	100-935	12/04/2000
Actara Insecticide	100-938	05/17/2001
Platinum Insecticide	100-939	05/17/2001
Cruiser Insecticide	100-941	12/04/2000
Meridian 25WG	100-943	02/15/2007
Flagship 25WG	100-955	07/30/2003
Flagship 0.22G	100-960	02/23/2007
Meridian 0.33G	100-961	02/23/2007
Helix Insecticide with Fungicides	100-973	12/04/2000
Platinum Ridomil Gold	100-974	05/17/2001
Centric 40WG	100-1147	04/11/2002
Cruiser XL Insecticide and Fungicide PrePack	100-1184	02/05/2004
Cruiser Extreme	100-1208	03/28/2005
Thiamethoxam 240 SC Manufacturing Use Product	100-1246	09/6/2006
CruiserMaxx	100-1247	05/24/2006
CruiserMaxx Potato Insecticide and Fungicide	100-1248	05/25/2006
Adage - Maxim 4FS Twinpack	100-1249	04/14/2006
Actara 240 SC Insecticide	100-1250	01/18/2007
Optigard Ant Gel Bait	100-1260	04/4/2007
Thiamethoxam Ant Killer Gel	100-1261	04/4/2007

1	Endigo ZC	100-1276	08/21/2007
2	THX/MXM/FDL CZ	100-1283	09/20/2007
3	Thiamethoxam Lawn & Landscape 0.33G	100-1288	11/02/2007
4	Thiamethoxam Lawn & Landscape 0.22G	100-1289	11/02/2007
5	Platinum 75 SG Insecticide	100-1291	01/17/2008
6	Thiamethoxam 0.02/Lambda-Cyhalothrin	100-1304	04/04/2008
7	CruiserMaxx Cereals	100-1305	04/16/2008
8	Durivo	100-1318	08/26/2008
9	Voliam Flexi Insecticide	100-1319	08/25/2008
10	Avicta Duo	100-1321	10/31/2008
11	Thiamethoxam 0.40/Lambda-cyhalothrin 0.16 ME	100-1334	05/12/2009
12	Concentrate		
13	Thiamethoxam 0.010/Lambda-cyhalothrin 0.004	100-1336	05/12/2009
14	ME RTU		
15	Meridian 0.20G	100-1341	06/22/2009
16	Meridian 0.14G	100-1346	07/01/2009
17	Agri-Flex Miticide/Insecticide	100-1350	04/06/2010
18	Avicta Duo 250	100-1353	10/27/2009
19	Cruiser PD Insecticide	100-1365	08/05/2011
20	Difenoconazole 0.170/Thiamethoxam	100-1366	08/05/2011
21	0.010/Lambda-cyhalothrin 0.004 ME RTU		
22	Difenoconazole 0.66/Thiamethoxam 0.40/Lambda-	100-1367	08/05/2011
23	cyhalothrin 0.16 ME Concentrate		
24	CruiserMaxx Rice	100-1369	07/20/2010
25	Optigard Liquid Ant Bait	100-1370	08/02/2010
26	Cruisermass Vibrance Cereals	100-1383	06/20/2012
27	Four-Way VAP	100-1384	10/29/2010
28	Avicta Complete Corn 500	100-1399	06/15/2011
	Avicta Complete Corn 250	100-1405	10/19/2011
	Caravan G	100-1415	01/11/2012
	THX_MXM_FDL_TBZ FS	100-1426	02/02/2012
	CruiserMaxx EZ	100-1427	02/02/2012
	Derby	100-1436	04/23/2012
	Tandem	100-1437	04/23/2012
	CruiserMaxx Peanuts	100-1438	04/30/2012
	Solvigo Miticide/Insecticide	100-1440	06/21/2012
	Adage Delux	100-1449	08/23/2012
	Adage Premier	100-1450	08/23/2012
	Avicta complete beans	100-1457	01/15/2013
	Endigo ZCX	100-1458	01/23/2013
	SYT0511	100-1460	01/30/2013

A large number of the listed pesticides products above are not potentially covered under any prior notice of application that was published in the Federal Register. Thus, the vast majority of approvals lacked the public notice and opportunity for public comment required under 7 U.S.C. § 136a(c)(4) and 40 C.F.R. § 152.102. Those approvals included new thiamethoxam uses on

1 crops and habitats where the Beekeeper and Honey Producer Plaintiffs' honey bees foraged and  
 2 pollinated. On information and belief, for each of the thiamethoxam insecticide uses and  
 3 products, EPA also failed to meet this requirement: "within 30 days after the Administrator  
 4 registers a pesticide under this Act the Administrator shall make available to the public the data  
 5 called for in the registration statement." 7 U.S.C. § 136a(c)(2)(A).

6 118. EPA's failure to provide Plaintiffs with the FIFRA-mandated notices of  
 7 application and issuance for the thiamethoxam registrations and changed uses in the Federal  
 8 Register, its denial of public comment opportunities, and its failure to make its registration data  
 9 available to the public within thirty days, denied Plaintiffs and the public the ability to submit  
 10 information to EPA that may have convinced the agency not to issue those approvals in the first  
 11 instance, or to cancel them after they were issued, and denied Plaintiff Beekeepers knowledge  
 12 that would have allowed them to protect their honey bees. EPA has allowed the uses of  
 13 products that cause unreasonable adverse effects and are harmful to Plaintiffs.

14 119. EPA's failure to publish the Federal Register notices as required under 7 U.S.C.  
 15 § 136a(c)(4) and 40 C.F.R. § 152.102, or to provide data required under 7 C.F.R. § 136a(2)(A),  
 16 establishes that these thiamethoxam products were approved "without observance of procedure  
 17 required by law," in violation of the APA. 5 U.S.C. § 706(2)(D).

#### 18 **FIFTH CLAIM**

#### 19 ***EPA Violated the FIFRA Conditional Registration Requirements and the APA for*** 20 ***Conditionally-Registered Clothianidin Products***

21 120. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 119, as  
 22 though fully alleged herein.

23 121. On information and belief, of the registered uses of clothianidin identified in  
 24 Appendix A, approximately twenty-three registrations are still registered as "conditional." A  
 25 reasonable time for the conditions on these product registrations to be met, including but not  
 26 limited to the adequate pollinator field study condition, has long passed. EPA has been arbitrary  
 27 and capricious and violated the FIFRA's conditional registration provisions, which require  
 28 compliance with conditions imposed within a limited, reasonable period. The FIFRA language

1 is mandatory, providing EPA “shall issue a notice of intent to cancel a [conditional] registration  
 2 . . . if . . . at the end of the period provided for satisfaction of any condition imposed, that  
 3 condition has not been met.” 7 U.S.C. § 136d(e)(1) (emphasis added). EPA’s own regulations  
 4 are clear that the time for compliance is limited. *See* 40 C.F.R. § 152.114-115. On information  
 5 and belief, the original EPA-imposed deadlines for meeting the conditions—three years in the  
 6 case of clothianidin’s initial product registration—have been violated. On information and  
 7 belief, EPA has unreasonably delayed for up to nine years in some cases and failed to issue any  
 8 such notice for these approximately twenty-three conditional registrations.

9 122. EPA has allowed impermissibly vague conditions for conditional registrations  
 10 that neither state nor refer to a limited time period for achievement. In some cases, such as the  
 11 pollinator field test study, EPA has, without a hearing, placed the conditions “in reserve,” with  
 12 no time period for achieving them, which violates the conditional registration requirements.  
 13 Despite repeated formal requests from the Plaintiffs, the Defendants’ duty to ensure compliance  
 14 with the clothianidin registration conditions has been unlawfully withheld and unreasonably  
 15 delayed, in violation of the FIFRA, 7 U.S.C. § 136a(c)(7), and the APA, 5 U.S.C. § 706(1).

16 123. EPA’s actions have damaged Plaintiffs. EPA’s failure to timely ensure  
 17 compliance with the registration conditions it imposed has allowed clothianidin products that  
 18 cause unreasonable adverse effects and are harmful to Plaintiffs to continue to be used, products  
 19 that EPA should have suspended.

## 20 **SIXTH CLAIM**

### 21 ***EPA Violated the FIFRA Conditional Registration Requirements and the APA for*** 22 ***Conditionally-Registered Thiamethoxam Products***

23 124. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 123, as  
 24 though fully alleged herein.

25 125. On information and belief, of the registered uses of thiamethoxam identified in  
 26 Appendix B approximately fifty-four registrations are still registered as “conditional.” A  
 27 reasonable time for the conditions on these product registrations to be met, including but not  
 28 limited to the adequate pollinator field study condition, has long passed. EPA has been arbitrary

1 and capricious and violated the FIFRA's conditional registration provisions, which require  
 2 compliance with conditions imposed within a limited, reasonable period. The FIFRA language  
 3 is mandatory, providing EPA "shall issue a notice of intent to cancel a [conditional] registration  
 4 . . . if . . . at the end of the period provided for satisfaction of any condition imposed, that  
 5 condition has not been met." 7 U.S.C. § 136d(e)(1) (emphasis added). EPA's own regulations  
 6 are clear that the time for compliance is limited. *See* 40 C.F.R. § 152.114-115. On information  
 7 and belief, the original EPA-imposed deadlines for meeting the conditions—two years in the  
 8 case of thiamethoxam's initial product registration—have been violated. On information and  
 9 belief, EPA has unreasonably delayed for up to eleven years in some cases and failed to issue  
 10 any such notice for these approximately fifty-four conditional registrations.

11 126. EPA has allowed impermissibly vague conditions for conditional registrations  
 12 that neither state nor refer to a limited time period for achievement. In some cases, such as the  
 13 pollinator field test study, EPA has, without a hearing, placed the conditions "in reserve," with  
 14 no time period for achieving them, which violates the conditional registration requirements.  
 15 Despite repeated formal requests from the Plaintiffs, the Defendants' duty to ensure compliance  
 16 with the thiamethoxam registration conditions has been unlawfully withheld and unreasonably  
 17 delayed, in violation of the FIFRA, 7 U.S.C. § 136a(c)(7), and the APA, 5 U.S.C. § 706(1).

18 127. EPA's actions have damaged Plaintiffs. EPA's failure to timely ensure  
 19 compliance with the registration conditions it imposed has allowed thiamethoxam products that  
 20 cause unreasonable adverse effects and are harmful to Plaintiffs to continue to be used, products  
 21 that EPA should have suspended.

## 22 **SEVENTH CLAIM**

### 23 ***EPA Violated the FIFRA Requirements and the APA for Unconditionally-Registered*** 24 ***Clothianidin Products***

25 128. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 127, as  
 26 though fully alleged herein.

27 129. EPA has unconditionally registered numerous clothianidin products for outdoor  
 28 use despite missing data on this pesticide. EPA's classification of clothianidin products as

1 unconditional, despite outstanding data gaps and conditions, violates the FIFRA's provisions for  
 2 unconditional registration. *Compare* 7 U.S.C. § 136a(c)(5) *with* 7 U.S.C. § 136a(c)(7).

3 130. For example, on April 22, 2010, without a hearing, EPA notified Valent U.S.A.  
 4 Corporation that its Clothianidin Technical product, which is the foundation for clothianidin  
 5 formulations and was previously conditionally registered, was reclassified to unconditional. On  
 6 information and belief, numerous other clothianidin product uses were similarly reclassified. For  
 7 Clothianidin Technical and all other products whose registrations are no longer conditional, the  
 8 removal or lifting of the conditions was arbitrary and capricious and in violation of the FIFRA's  
 9 conditional registration provisions because the conditions were not fully met before they were  
 10 removed.

11 131. On information and belief, EPA has classified fourteen clothianidin products are  
 12 as unconditional despite the failure of the registrants to fill existing data gaps and comply with  
 13 the past conditions, including at least the following registration numbers and names:

14 Clothianidin

15 # 264-984 – Titan FL  
 16 # 264-1121 – Prosper Evergol  
 17 # 264-1125 – Ernesto Quantum  
 18 # 59639-153 – V-10170 16 WSG insecticide  
 19 # 59639-156 – Arena 0.5 G  
 20 # 59639-173 – V-10170 0.25 G insecticide  
 21 # 59639-176 – Inovate seed protectant  
 22 # 59639-183 – Nipsit suite cereals of seed protectant  
 23 # 59639-184 – Nipsit suite canola seed protectant  
 24 # 59639-187 – Inovate neutral seed protectant  
 25 # 72155-96 – Insecticide TD Granule  
 26 # 73049-467 – Darlex insecticide  
 27 # FL 11001 – Arena 50 WDG Insecticide  
 28 # ID 060015 – Poncho 600

None of these products otherwise meet the criteria for unconditional registration.

132. EPA's classification of these clothianidin products as unconditional registrations  
 while maintaining the conditional registrations for numerous other clothianidin products is  
 inconsistent, arbitrary, capricious, and is in violation of the FIFRA's requirements for  
 conditional registrations and the APA. EPA's actions alleged herein contradicted the earlier

requests by Plaintiffs that the condition classifications be maintained and that full compliance with the pollinator field test condition, in particular, be compelled. Further, EPA's action of issuing unconditional registrations despite a preponderance of evidence that these clothianidin products, when used in accordance with widespread and commonly recognized practice, cause unreasonable adverse effects on the environment, violated the FIFRA and the APA.

133. EPA's actions have damaged Plaintiffs. EPA's failure to fully enforce the conditions it imposed has allowed clothianidin products that cause unreasonable adverse effects and are harmful to Plaintiffs to continue to be used, products that EPA should have suspended.

### **EIGHTH CLAIM**

#### ***EPA Violated the FIFRA Requirements and the APA for Unconditionally-Registered Thiamethoxam Products***

134. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 133, as though fully alleged herein.

135. EPA has unconditionally registered numerous thiamethoxam products despite missing data on this pesticide. EPA's classification of these thiamethoxam products as unconditional, despite outstanding data gaps and conditions, violates the FIFRA's provisions for unconditional registration. *Compare* 7 U.S.C. § 136a(c)(5) *with* 7 U.S.C. § 136a(c)(7).

136. For all thiamethoxam products whose registrations are no longer conditional, the removal or lifting of the conditions was arbitrary and capricious and in violation of the FIFRA's conditional registration provisions because the conditions were not fully met before they were removed.

137. On information and belief, EPA classified seven thiamethoxam products as unconditional despite the failure of the registrants to fill data gaps and meet missing conditions, including at least the following registration numbers and names:

#### **Thiamethoxam**

- # 100-1184 – Cruiser XL insecticide and fungicide prepack
- # 100-1246 – Thiamethoxam 240 SC manufacturing product
- # 100-1365 – Cruiser PD insecticide
- # 100-1369 – Cruisermass rice
- # 100-1405 – Avicta complete corn



# 100-1415 – Caravan G

# 34704-939 – Dyna-shield thiamethoxam fungicide

None of these products otherwise meet the criteria for unconditional registration.

138. EPA's classification of these products as unconditional registrations while maintaining the conditional registrations and outstanding data requirements on numerous other thiamethoxam products is inconsistent, arbitrary, capricious, and is in violation of the FIFRA's requirements for conditional registrations and the APA. EPA's actions alleged herein contradicted the earlier requests by Plaintiffs that the condition classifications be maintained and that full compliance with the pollinator field test condition, in particular, be compelled. Further, EPA's actions of issuing unconditional registrations despite a preponderance of evidence that these thiamethoxam products, when used in accordance with widespread and commonly recognized practice, cause unreasonable adverse effects on the environment, violated the FIFRA and the APA.

139. EPA's actions have damaged Plaintiffs. EPA's failure to fully enforce the conditions it imposed has allowed thiamethoxam products that cause unreasonable adverse effects and are harmful to Plaintiffs to continue to be used, products that EPA should have suspended.

### **NINTH CLAIM**

#### ***EPA is Violating the FIFRA Suspension Requirements and the APA for Clothianidin Products***

140. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 139, as though fully alleged herein.

141. When used in accordance with widespread and commonly recognized practice, clothianidin currently causes unreasonable adverse effects on the environment.

142. The legal burden of showing that any pesticide and any approved uses meet the FIFRA criteria to be eligible for continued registration rests with the products' proponents. *See* 40 C.F.R. § 154.5. The proponents of clothianidin's numerous uses have not met that burden.

143. Plaintiffs have repeatedly formally requested EPA to suspend the registrations for clothianidin products, listed in Appendix A, and the agency has refused. EPA's failure to

1 suspend the registrations of these products in view of their unreasonable adverse effects violates  
2 the FIFRA, 7 U.S.C. § 136d(b), and the APA, 5 U.S.C. § 706(1)-(2).

3 144. EPA's actions are damaging Plaintiffs as previously stated herein. EPA's  
4 ongoing failure to suspend the clothianidin registrations is allowing these products, which cause  
5 unreasonable adverse effects and are harmful to Plaintiffs, to continue to be used without  
6 restrictions across the nation.

### 7 **TENTH CLAIM**

#### 8 ***EPA is Violating the FIFRA Suspension Requirements and the APA for Thiamethoxam*** 9 ***Products***

10 145. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 144, as  
11 though fully alleged herein.

12 146. When used in accordance with widespread and commonly recognized practice,  
13 thiamethoxam currently causes unreasonable adverse effects on the environment.

14 147. The legal burden of showing that any pesticide and any approved uses meet the  
15 FIFRA criteria to be eligible for continued registration rests with the products' proponents. *See*  
16 40 C.F.R. § 154.5. The proponents of thiamethoxam's numerous uses have not met that burden.

17 148. Plaintiffs have repeatedly formally requested EPA to suspend the registrations for  
18 thiamethoxam products, listed in Appendix B, and the agency has refused. EPA's failure to  
19 suspend the registrations of these products in view of their unreasonable adverse effects violates  
20 the FIFRA, 7 U.S.C. § 136d(b), and the APA, 5 U.S.C. § 706(1)-(2).

21 149. EPA's actions are damaging Plaintiffs as previously stated herein. EPA's  
22 ongoing failure to suspend the thiamethoxam registrations is allowing these products, which  
23 cause unreasonable adverse effects and are harmful to Plaintiffs, to continue to be used without  
24 restrictions across the nation.

### 25 **ELEVENTH CLAIM**

#### 26 ***EPA Violated the FIFRA's Labeling Requirements for Clothianidin Products***

27 150. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 149, as  
28 though fully alleged herein.



1 inadequate. It is arbitrary and capricious for EPA to continue to rely on inconsistent product  
2 labels that are inadequate to fully warn of thiamethoxam's environmental risks and that the  
3 agency lacks the ability to enforce.

4 157. EPA's actions have damaged Plaintiffs. EPA's failure to comply with the  
5 FIFRA's labeling requirements has allowed uses of thiamethoxam products according to their  
6 labels in ways that that are harmful to Plaintiffs. Such harms would be avoided if the products  
7 included consistent, adequate warnings and directions.

### 8 **THIRTEENTH CLAIM**

#### 9 ***EPA's Actions in Approving Clothianidin Products and Labels Violated the ESA***

10 158. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 157, as  
11 though fully alleged herein.

12 159. Prior to registering the approximately thirty-five clothianidin products listed in  
13 Appendix A over the last ten-year period, EPA violated Section 7 of the ESA by failing to: a)  
14 ensure, in consultation with FWS, that the EPA-approved uses of clothianidin would not be  
15 likely to jeopardize the continued existence of any threatened or endangered species or result in  
16 the destruction or adverse modification of the critical habitat of such species; b) request from  
17 FWS information on whether any threatened or endangered species, or designated critical  
18 habitat, may be present within or near the areas of the proposed uses; c) prepare, at the earliest  
19 possible time, a biological assessment to determine whether any threatened and endangered  
20 species may be affected by the proposed uses or the agency's changes from the conditional  
21 classification for those uses; d) engage in consultation with FWS regarding the potential adverse  
22 effects of clothianidin on threatened and endangered species and critical habitat; and e) ensure  
23 that the agency, registrants, and users of clothianidin products would not make any irreversible  
24 or irretrievable commitment of resources with respect to the sale and use of these compounds  
25 prior to EPA initiating and completing consultation with FWS. EPA's Section 7 failures  
26 occurred despite clear evidence in the agency's own risk assessment documents that EPA's  
27 actions would adversely affect particular listed species and posed a risk to broad suites of listed  
28

species. These actions constitute a violation of the ESA within the meaning of 16 U.S.C. § 1540(g).

160. Scientific information on the impacts of clothianidin on invertebrates, birds, and ecosystems compels ESA § 7 effects determinations and consultation with FWS. Such information includes, but is by no means limited to, the March 2013 report by the American Bird Conservancy, which shows high direct and indirect mortality risks to a broad suite of birds from clothianidin products. EPA's continuing authority over the conditional and unconditional registrations of these insecticidal products constitutes ongoing action and it has violated its continuing obligation to follow the requirements of the ESA.

161. EPA further failed to comply with Section 7 of the ESA when it approved the label language for the clothianidin products listed in Appendix A; the products pose adverse effects to ESA-listed species because of this failure.

162. EPA's failures to comply with the ESA have allowed the clothianidin products to directly and indirectly harm and otherwise "take" federally-listed species, including, but not limited to, plant pollinators and birds, and have also adversely impacted critical habitats, damaging Plaintiffs' ability to enjoy and utilize those species and habitats and Plaintiffs' interests in their existence and well-being.

#### **FOURTEENTH CLAIM**

##### ***EPA's Actions in Approving Thiamethoxam Products and Labels Violated the ESA***

163. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 162, as though fully alleged herein.

164. Prior to registering the approximately sixty-eight thiamethoxam products listed in Appendix B over the last thirteen-year period, EPA violated Section 7 of the ESA by failing to:

a) ensure, in consultation with FWS, that the EPA-approved uses of thiamethoxam would not be likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species; b) request from FWS information on whether any threatened or endangered species, or designated critical habitat, may be present within or near the areas of the proposed uses; c) prepare, at the earliest

1 possible time, a biological assessment to determine whether any threatened and endangered  
2 species may be affected by the proposed uses or the agency's changes from the conditional  
3 classification for those uses; d) engage in consultation with FWS regarding the potential adverse  
4 effects of thiamethoxam on threatened and endangered species and critical habitat; and e) ensure  
5 that the agency, registrants, and users of thiamethoxam products would not make any irreversible  
6 or irretrievable commitment of resources with respect to the sale and use of these compounds  
7 prior to EPA initiating and completing consultation with FWS. EPA's Section 7 failures  
8 occurred despite clear evidence in the agency's own risk assessment documents that EPA's  
9 actions would adversely affect particular listed species and posed a risk to broad suites of listed  
10 species. These actions constitute a violation of the ESA within the meaning of 16 U.S.C.  
11 § 1540(g).

12       165. Scientific information on the impacts of thiamethoxam on invertebrates, birds,  
13 and ecosystems compels ESA § 7 effects determinations and consultation with FWS. Such  
14 information includes, but is by no means limited to, the March 2013 report by the American Bird  
15 Conservancy, which shows high direct and indirect mortality risks to a broad suite of birds from  
16 thiamethoxam products. EPA's continuing authority over the conditional and unconditional  
17 registrations of these insecticidal products constitutes ongoing action and it has violated its  
18 continuing obligation to follow the requirements of the ESA.

19       166. EPA further failed to comply with Section 7 of the ESA when it approved the  
20 label language for the thiamethoxam products listed in Appendix B; the products pose adverse  
21 effects to ESA-listed species because of this failure.

22       167. EPA's failures to comply with the ESA have allowed the thiamethoxam products  
23 to directly and indirectly harm and otherwise "take" federally-listed species, including, but not  
24 limited to, plant pollinators and birds, and have also adversely impacted critical habitats,  
25 damaging Plaintiffs' ability to enjoy and utilize those species and habitats and Plaintiffs'  
26 interests in their existence and well-being.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order:

168. Direct EPA to fully consider the information Plaintiffs submitted and the effects on ESA-listed species on the question of “imminent hazard” of clothianidin use. The Court should order EPA to reconsider its final action of July 17, 2012, when Defendants denied an imminent hazard pursuant to the Plaintiffs’ Petition to suspend clothianidin without considering the full information filed by Plaintiffs and without consulting with FWS under the ESA on whether a hazard was posed to threatened and endangered species and their critical habitats. The Court should direct EPA to consider all of the information filed related to imminent hazard, to consult with FWS under Section 7 of the ESA, and to issue a new decision on the question of imminent hazard.

169. Declare that all of clothianidin’s and thiamethoxam’s registrations and changed use approvals, for which a “notice of receipt of application” and/or a “notice of issuance” were not published in the Federal Register, are in violation of the FIFRA and its implementing regulations, and vacate them. The Court should issue a declaratory judgment that those approvals lacking public notices and an opportunity for public comments violated 7 U.S.C. § 136a(c)(4) and 40 C.F.R. § 152.102; and that those approvals should be vacated until and unless EPA provides such notices and opportunity.

170. Declare that clothianidin’s and thiamethoxam’s conditional and unconditional use approvals violated the FIFRA and vacate them. The Court should issue a declaratory judgment that compliance with the conditions EPA placed on the pesticide registrations at issue has been unlawfully withheld and unreasonably delayed under the FIFRA and the APA, and should vacate them. Further, the Court should issue a declaratory judgment that EPA’s removal of conditions and allowance of unconditional registrations for multiple thiamethoxam and clothianidin products violated the FIFRA’s conditional use provisions, was arbitrary and capricious, and caused unreasonable adverse effects to the environment. The Court should vacate these unlawful registrations.



1           171. Order EPA to immediately suspend the registrations of clothianidin and  
2 thiamethoxam. The Court should direct EPA to suspend all approved outdoor uses of  
3 clothianidin and thiamethoxam, and issue a stop sale, use or removal order for all such approved  
4 outdoor products, pending compliance with the many unsatisfied conditional registration  
5 requirements to provide outstanding safety data including, but not limited to, the preparation,  
6 publication, and agency review of a field study sufficient to support a finding that these  
7 compounds do not pose unreasonable adverse effects to honey bees and other insect pollinators.

8           172. Direct EPA to cure clothianidin's and thiamethoxam's inadequate labels. The  
9 Court should declare that clothianidin and thiamethoxam products are misbranded with labels  
10 and use directions that are inadequate to prevent unreasonable adverse effects to the  
11 environment, to beekeepers and honey producers, and to ESA-listed species. The Court should  
12 order EPA to develop new product labels and directions fully adequate to advise users on how to  
13 prevent these adverse effects.

14           173. Direct EPA to comply with the ESA. The Court should order EPA to comply  
15 with the ESA by making the required "effects" determinations, and initiating and completing  
16 consultation with FWS concerning clothianidin and thiamethoxam products' impacts on native  
17 endangered and threatened species and their critical habitats. The Court should order EPA to  
18 ensure that uses of these insecticides do not "take" threatened and endangered species or affect  
19 their critical habitats without appropriate mitigation and should enjoin any further use of the  
20 insecticides prior to completion of the ordered consultations.

21           174. Enjoin proposed new clothianidin and thiamethoxam product uses. The Court  
22 should enjoin EPA from approving any pending outdoor use approvals for clothianidin or  
23 thiamethoxam, or any other future proposed outdoor uses of them, until the agency complies  
24 with all of the Requests for Relief herein for the currently registered uses to avoid unreasonable  
25 adverse effects to Plaintiffs and on the environment.

26           175. Award Plaintiffs the costs of this litigation, including reasonable attorneys' fees  
27 and expert witness fees; and

28           176. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 31st day of May, 2013.

/s/ Sylvia Shih-Yau Wu

SYLVIA SHIH-YAU WU (State Bar No. 273549)

GEORGE A. KIMBRELL (*Pro Hac Vice*)

PETER T. JENKINS (*Pro Hac Vice*)

PAIGE M. TOMASELLI (State Bar No. 237737)

Center for Food Safety

303 Sacramento Street, 2nd Floor

San Francisco, CA 94111

T: (415) 826-2770 / F: (415) 826-0507

Emails: gkimbrell@centerforfoodsafety.org

pjenkins@centerforfoodsafety.org

ptomaselli@centerforfoodsafety.org

swu@centerforfoodsafety.org

*Counsel for Plaintiffs*